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# CUMULATIVE DIGEST

## CH. 10
## CONFESSIONS

Top

**§10-1**
**Fifth Amendment Rights**

**People v. Stevens**, 2014 IL 116300 (No. 116300, 12/18/14)

The privilege against self-incrimination prohibits compelled testimony, but does not prohibit a defendant from testifying voluntarily in matters that may incriminate him. When a defendant testifies in his own behalf he subjects himself to legitimate cross-examination. Although cross-examination is generally limited to the subject matters explored on direct examination, it is proper during cross to pose questions that explain, qualify, discredit, or destroy a defendant's direct testimony, including questions that affect his credibility, even if they involve new material.

At defendant's trial for the aggravated criminal sexual assault of B.P., the State was allowed to introduce evidence that defendant sexually assaulted another woman (R.G.). Both B.P. and R.G. testified that defendant abducted and sexually assaulted them. Defendant testified on direct that he and B.P had consensual sex. He did not testify about R.G.'s allegations.

On cross, the State was allowed, over objection, to question defendant about R.G.'s allegations. On appeal defendant argued that his right against self-incrimination was violated when he was forced to answer questions about R.G.'s assault.

The Illinois Supreme Court held that the State's questions about R.G.'s assault did not violate defendant's right to self-incrimination. When defendant testified on his own behalf he opened himself up to legitimate cross-examination, including questions that discredited his direct testimony and called his credibility into question. His direct testimony put the issue of consent and his credibility in general in question, and the cross-examination about R.G. discredited defendant on both of those matters. The cross thus did not violate defendant's right against self-incrimination.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

**People v. Clayton**, 2014 IL App (1st) 130743 (No. 1-13-0743, 9/30/14)

1. Under 725 ILCS 5/103-2.1(d), police must make an accurate electronic recording of any "custodial" interrogation that occurs as part of a murder investigation. If a murder suspect is subjected to an unrecorded custodial interrogation, any statements which the suspect makes during or following the non-recorded interrogation are presumed to be inadmissible even if those statements were recorded. The presumption of inadmissibility may be overcome by showing, by a preponderance of the evidence, that the statements were voluntarily given and are reliable. 725 ILCS 5/103-2.1(f).

Under §103-2.1(a), a "custodial interrogation" occurs where: (1) a reasonable person in the subject's position would consider himself or herself to be in custody, and (2) a question is asked that is reasonably likely to elicit an incriminating response. Factors that are relevant in determining whether an individual is in custody include: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present; (3) the presence or absence of the suspect's family and friends; (4) any indicia of a formal arrest such as a show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the suspect arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused.

2. The court concluded that defendant was subjected to custodial interrogation when she made her first statement, and that under §103-2.1 the encounter should have been electronically recorded. Four police officers came to the home of the 17-year-old defendant at 11:00 p.m., and asked that she accompany them to the police station to give a statement. Defendant was not given an opportunity to come to the station on her own or with her parents, with whom she lived, and was transported by officers in an unmarked car. Although the record was conflicting concerning whether the defendant was handcuffed during the ride, upon reaching the station defendant was placed in an interview room and was not told that she could leave.

The State presented no evidence concerning the mood or mode of questioning during the unrecorded interview. In addition, nothing in defendant's background and experience would have "offset her perception that she was obligated to accompany the police . . . and answer any questions posed to her." Under these circumstances, a reasonable person in defendant's position would have believed that she was not free to leave.

The court rejected the State's argument that the videotape of the second interview, in which defendant was asked to affirm that she came to the station voluntarily and of her own free will, indicated that she was not in custody. A teenager could not be expected to argue with police concerning whether she had come to the station voluntarily. Furthermore, even if defendant originally came to the station voluntarily, there was no record of what occurred between the time she arrived and the taped interview, which occurred some five hours later. Thus, the tape did not establish that the statement was voluntary.

3. Furthermore, the record suggested that defendant was subjected to custodial interrogation in the first, unrecorded interview. Although there was no evidence concerning the substance of the first interview, the police gave defendant **Miranda** warnings before the second interview, elected to record that interview, alluded to defendant's earlier statements, and asked why her statements during the second interview were inconsistent with the first interview. Under these circumstances, the trial court did not err by finding that the defendant was subjected to custodial interrogation during the first interview.

4. Where police fail to record the custodial interrogation of a murder suspect, any subsequent statements are presumed to be inadmissible. The State can overcome the presumption of inadmissibility if it can show by a preponderance of evidence that the statements were given freely and voluntarily. The court concluded that the State failed to meet its burden where it offered no evidence other than the videotapes themselves to establish that the statements made in the second and third interviews were voluntary and reliable.

5. The court also rejected the State's argument that the failure to record the first interview was "inadvertent," noting that in the trial court the State asserted that the police failed to record the first interview because they believed that defendant was merely a witness. The court also noted that at the trial court level the State failed to argue voluntariness or reliability until its motion for reconsideration, and even then failed to present any relevant evidence.

Because the trial court's finding that the defendant was in custody during the unrecorded first interrogation was not against the manifest weight of the evidence, any statements made after the unrecorded interview were presumed inadmissible. Because the State failed to introduce evidence sufficient to show that the later statements were voluntary and reliable, the trial court properly suppressed those statements.

**People v. Haleas**, 404 Ill.App.3d 668, 937 N.E.2d 327 (1st Dist. 2010)

1. In criminal proceedings against a police officer, the 5th and 14th Amendments prohibit

use of statements which the officer made under threat of suspension or termination for exercising the right to silence. (**Garrity v. New Jersey**, 385 U.S. 493 (1967)). In **Garrity**, state law mandated discharge of police officers who invoked the privilege against self-incrimination when questioned as part of an internal police investigation. Although courts have reached differing conclusions where discharge is not mandatory, the court concluded that **Garrity**-type immunity is triggered when an officer is warned that his employment can be suspended or terminated if he exercises the right to silence when questioned about possible police misconduct. The court concluded that once such warnings are given, any statements obtained are "compelled" under the 5th Amendment.

The court rejected the State's argument that only incriminating statements are protected under **Garrity.** First, the truthfulness of a statement has no bearing on whether it is "compelled." Furthermore, even exculpatory testimony may lead to incriminating evidence.

Because defendant was warned by internal affairs investigators that termination or suspension could be based on any statement he made or on his exercise of the right to silence, his exculpatory statement could not be introduced at his subsequent criminal trial for obstructing justice, official misconduct, and perjury. The trial court's suppression order was affirmed.

2. However, the trial court erred by dismissing the indictments. Under **Kastigar v. U.S.**, 406 U.S. 441 (1972), a defendant who testifies under a grant of immunity is entitled to dismissal of the charges unless the State shows that the evidence used in the criminal proceeding has a legitimate, independent source from the compelled testimony. The court concluded that the **Kastigar** doctrine applies to statements which are "compelled" under **Garrity**. Thus, the prosecution was required to show an independent source for the evidence it used to obtain indictments against the defendant.

The court concluded that the trial court applied an erroneous standard when it required the State to show not only that the evidence on which the indictment was based was obtained from an independent source, but also that the prosecution had made no "significant non-evidentiary" use of the defendant's statements in "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination [or] otherwise generally planning trial strategy." The court stressed that the purpose of the independent source doctrine is to insure that evidence derived from immunized statements is not presented to the jury, and that extending **Kastigar** to non-evidentiary uses would place the State in a worse position than if no misconduct had occurred.

The cause was remanded for a new hearing on the motion to dismiss the charges.

**People v. Harris**, 2012 IL App (1st) 100678 (No. 1-10-0678, 8/30/12)

1. An individual subjected to custodial interrogation is entitled to have retained or appointed counsel present during the questioning. If the accused requests counsel at any time during the interrogation, she cannot be subject to further questioning unless a lawyer has been made available or the suspect reinitiates conversation. **Edwards v. Arizona**, 451 U.S. 477 (1981).

Whether defendant actually invoked her right to counsel is an objective inquiry, which at a minimum requires some statement that can reasonably be construed as an expression of a desire for counsel. A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning.

2. Defendant asked if it was "possible" to "have a few days to get an attorney," to which the officer responded, "No." Defendant began to ask, "How long can I —" but was interrupted by the officer who momentarily left the holding cell. On his return, the officer asked whether

defendant was requesting an attorney, because if she was they were "done talking." Defendant responded that she did not know how she could make a call because "all my [phone] numbers is at the county." Defendant then agreed to answer questions.

3. Defendant's query whether it was possible to have some time to get an attorney was an unequivocal invocation of her right to counsel. Any ambiguity in her statement was only with regard to how long it would take and the process of acquiring an attorney, not with regard to whether she wanted one. She answered further questions only at the officer's prompting. Therefore, the statements made by defendant after her invocation of her right to counsel, including her recorded statements, were inadmissible.

4. Any statement made as a result of custodial interrogation at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in a murder case unless it is electronically recorded. 725 ILCS 5/103-2.1(b). If the trial court finds by a preponderance of the evidence that this provision was violated, any statements made by the defendant during or following that non-recorded custodial interrogation are presumed inadmissible, even if those statements were obtained in compliance with §103-2.1(b). 725 ILCS 5/103-2.1(d). It is irrelevant that the police did not willfully violate §103-2.1(b). The presumptive inadmissibility of such statements can be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. 725 ILCS 5/103-2.1(f).

5. Under the statute, a custodial interrogation occurs when a reasonable person in the suspect's position would consider herself in custody and is presented with a question reasonably likely to elicit an incriminating response. 725 ILCS 5/103-2.1(a). The statute thus codifies the common-law definition of custodial interrogation developed by **Miranda v. Arizona**, 384 U.S. 436 (1966), and its progeny. Both **Miranda** and §103-2.1 serve a protective purpose, and therefore **Miranda** case law can serve as guidance in interpreting §103-2.1.

Factors relevant to the determination whether a defendant is in custody include: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the person; (4) any indicia of formal arrest procedures, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. A court must determine whether a reasonable person, innocent of any crime, would have believed that she could terminate the encounter and was free to leave.

6. Factors (1), (3), and (5) demonstrate that defendant was unquestionably subject to custodial interrogation. The police picked her up from a friend's house after midnight, after searching for her for more than a week, and transported her in an unmarked squad car to the station. There she was placed alone in an interview room that was likely locked. At the station, defendant admitted she had given the police a false name because she had an outstanding warrant for her arrest on a probation violation. Once the police confirmed this, defendant was not free to leave.

The Appellate Court was not persuaded by the State's argument that defendant was in custody on the probation violation and not the murder. "[T]he only fair reading of the circumstances in the record is that the police held the defendant in continued custody on the probation violation and, at best, used this custody to mask their intention to question her solely about the murder." Defendant was subjected to five interviews over 24 hours that were conducted with a confrontational mood of questioning, and the police did not convey that defendant could decline to answer questions. "This was more than mere investigatory questioning; it was custodial interrogation of a murder suspect."

7. Because defendant made an incriminating statement as a result of custodial interrogation at the police station, her statement was presumptively inadmissible because it was not electronically recorded. This presumption was not overcome because the State presented no evidence related to the voluntariness of the unrecorded statement. That evidentiary gap was not filled by evidence of the subsequent videotaped statements. The Appellate Court directed that a determination be made whether defendant's unrecorded statement was voluntary and reliable prior to retrial.

Defendant's felony murder conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

**People v. Snow**, 403 Ill.App.3d 734, 936 N.E.2d 662 (4th Dist. 2010)

1. The 5th Amendment privilege against self-incrimination protects one from being "compelled" to testify. Where a defendant testifies voluntarily, without claiming the privilege, the 5th Amendment does not limit use of the testimony in subsequent proceedings.

Where defendant filed a petition to rescind a summary suspension of his driver's license under the implied consent statute, and testified without asserting the 5th Amendment privilege on direct or cross-examination, his testimony was not "compelled." Therefore, his testimony at the rescission hearing was admissible in the subsequent criminal trial for DUI.

2. The court rejected defendant's argument that he had no choice whether to testify, because in the absence of any other witness who could testify to the circumstances of his arrest, his motion to rescind would be denied. Although some courts have found that a defendant may be "compelled" by duress to testify, such cases generally involve the potential loss of one's livelihood. (See **Garrity v. New Jersey**, 385 U.S. 493 (1967) (refusal to testify would result in termination of police officers)). Being required to choose between which of two rights to exercise does not constitute duress.

Thus, a defendant who files a motion to rescind summary suspension is not "compelled" to testify merely because he must choose whether to testify in his case-in-chief or risk that his petition will be denied.

3. The government may compel a defendant to testify in a civil proceeding, but such testimony is inadmissible in a pending or subsequent criminal proceeding. Thus, although the petitioner could be required to testify at a rescission hearing if called as an adverse witness by the State, his testimony could not be used in the underlying criminal trial for DUI.

**People v. Stevens**, 2013 IL App (1st) 111075 (No. 1-11-1075, 6/14/13)

The privilege against self-incrimination may be waived by a defendant who testifies as a witness. Once the privilege has been waived, a defendant becomes subject to cross-examination in the same manner as any other witness. The waiver is not partial. Defendant cannot choose to testify and present a defense and then limit the State's ability to impeach that testimony by avoiding relevant impeachment evidence during his direct examination. He cannot claim the privilege on cross-examination on matters reasonably related to the subject matter of his direct examination.

Defendant waived his privilege against self-incrimination when he chose to testify that his sexual encounter with the complainant was consensual. He could not reassert the privilege on cross-examination when the prosecutor questioned him regarding another offense to discredit defendant's claim of a consensual encounter, where evidence of that other offense had been properly admitted in the State's case-in-chief as propensity evidence (725 ILCS 5/115-7.3).

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

Top

**§10-2**
**Suppression Motions and Hearings**

**People v. Harper**, 2013 IL App (4th) 130146 (No. 4-13-0146, 12/18/13)

Under section 103-2.1 of the Code of Criminal Procedure, any custodial statement of an accused charged with certain homicide offenses is presumptively inadmissible unless it was electronically recorded and the recording is substantially accurate and not intentionally altered. 725 ILCS 5/103-2.1(b). The State may overcome this presumption of inadmissibility by establishing by a preponderance of the evidence that based on the totality of the circumstances the statement was voluntary and reliable. 725 ILCS 5/103-2.1(f).

The legislature's inclusion of subsection (f) shows that it did not intend to bar statements the police failed to record due to inadvertence or malfunctioning equipment. The court must determine whether the *statement* was voluntary and reliable, not whether the recording or the police summary of the statement was reliable. The question is whether testimony about the statement is admissible, not whether the recording is admissible, which is a separate question.

The appeal in this case followed a remand from the Appellate Court vacating the trial court's previous suppression of defendant's statements because approximately 30 minutes of the recording were inaudible. The Appellate Court ordered the trial court to determine whether the recording was substantially accurate, and if not, whether the defendant's statement was voluntary and reliable. **People v. Harper**, 2012 IL App (4th) 110880 (No. 4-11-0880, 5/25/12). On remand, the trial court held that the recording was substantially inaccurate, and that the defendant's statements were voluntary but not reliable. The trial court again suppressed the statements and the State appealed.

The Appellate Court, employing a manifest weight of the evidence test, held that the trial court erred in finding that the statements were not reliable. Under the totality of the circumstances, the Appellate Court found that the statements were reliable based on several factors. First, the defendant was an adult of average intelligence, was not mentally ill or under the influence of alcohol or drugs, was not handcuffed or restrained, and was allowed to smoke, chew gum and use the bathroom. In addition, the police used no physical abuse or other coercive tactics, gave defendant Miranda warnings, used no questionable memory enhancement techniques such as hypnosis, and did not claim defendant made any inculpatory statements during the interview.

The Court noted that there is some overlap in the factors to be considered in determining voluntariness and reliability. The Court emphasized that the recording of the interrogation itself was the strongest evidence that defendant's statements were reliable. The Appellate Court reversed the trial court's suppression order and remanded for further proceedings.

(Defendant was represented by Assistant Deputy Nancy Vincent, Springfield.)

**People v. Harper**, 2012 IL App (4th) 110880 (No. 4-11-0880, 5/25/12)

1. Section 103-2.1 of the Code of Criminal Procedure provides that any oral, written, or sign language statement of an accused made as a result of custodial interrogation at a police

station or other place of detention is presumed inadmissible where defendant is charged with certain homicide offenses unless: (1) an electronic
recording is made of the custodial interrogation, and (2) the recording is substantially accurate and not intentionally altered. 725 ILCS 5/103-2.1(b). This presumption of inadmissibility "may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of circumstances." 725 ILCS 5/103-2.1(f).

If a statement is inadmissible under §103-2.1, the State cannot introduce it in its case in chief in any form. An inadvertent failure to record an interview or an error in the recording process is not an automatic and absolute bar to the admission of the statement. Subsection (f) allows the State to overcome the presumption of admissibility based on a showing of the voluntariness and reliability of the statement.

2. Purporting to act pursuant to §103-2.1, the trial court suppressed a recording of defendant's custodial statement and a transcript of that recording because approximately 30 minutes of a recording was inaudible. According to the Appellate Court, the trial court found that even an innocent malfunction was sufficient to result in suppression of the statement. The trial court also found that the inaudibility of a portion of the recording rendered the recording "untrustworthy and unreliable as a whole," but reserved ruling on whether the police officers could testify to the statement made at the custodial interrogation.

3. The Appellate Court concluded that the trial court erred in ruling on the admissibility of the recording and the transcript, as opposed to the statement itself. Further, under the plain language of the statute, an innocent malfunction of the recording equipment was insufficient to suppress statement. The trial court should have focused on whether the missing audio portion made the recording substantially inaccurate, and if so, then determined if the presumption of inadmissibility was overcome by evidence that the statement was voluntarily given and is reliable under subsection (f).

The Appellate Court remanded for a determination by the trial court whether the recording was substantially accurate, and if not, "whether the State established by a preponderance of the evidence defendant's *statement* is dependable and fit to be relied upon based on the totality of circumstances in this case."

4. The court declined to affirm the trial court's judgment on the ground that it did not abuse its discretion in ruling that the recording and transcript were inadmissible due to the partial inaudibility of the recording. While an Appellate Court can affirm a trial court's decision on a motion to suppress based on any ground of record in an interlocutory appeal, the Appellate Court declined to do so where the trial court misinterpreted §103-2.1 of the Code.

(Defendant was represented by Assistant Deputy Nancy Vincent, Springfield.)

**Top**

**§10-3**
**Miranda Warnings**

**§10-3(a)**
**Generally**

**Florida v. Powell**, ___ U.S. ___, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (No. 08-1175, 2/23/10)

1. In order to protect the right against self-incrimination, **Miranda v. Arizona**

established certain procedural safeguards which permit custodial interrogation only after police advise criminal suspects of their rights under the Fifth and Fourteenth Amendments. **Miranda** requires that police advise a defendant of his or her right to remain silent, that anything the defendant says can be used in court, that the defendant has the right to the presence of an attorney, and that an indigent can request that an attorney be appointed before questioning.

Although the warnings are mandatory, the Supreme Court has not dictated specific language to be given. Instead, the relevant inquiry is whether the language chosen by police conveys the information required by **Miranda**.

2. The warnings given in this case were sufficient to satisfy **Miranda**. The officer informed defendant that he had "the right to talk to a lawyer before answering any of our questions" and "the right to use any of these rights at any time you want during this interview." The officer included all information required by **Miranda**, and the assurance that defendant could consult with an attorney and exercise his rights at any time reasonably conveyed the right to have an attorney present during the interrogation.

The court rejected the Florida Supreme Court's holding that the warnings would have given a reasonable person the impression that consultation with an attorney could occur only before the interrogation began. The court acknowledged that many states and the FBI explicitly warn a defendant of the right to have an attorney present during questioning, but found that the express inclusion of such language is not required if the words used by the officer "communicated the same essential message."

3. See also **APPEAL**, §2-6(a)).

**People v. Barnett**, 393 Ill.App.3d 556, 913 N.E.2d 1221 (3d Dist. 2009)

1. Statements obtained from a person as a result of "custodial interrogation" are admissible at trial only if **Miranda** warnings were given. "Interrogation" includes express police questioning and words or actions that are reasonably likely to elicit an incriminating response. The definition of "interrogation" focuses primarily on the perception of the defendant, not that of the officer.

2. Several statements made by the defendant were in response to custodial interrogation.[1] After defendant's arrest for DUI, the officer asked who owned the vehicle defendant had been driving, despite having already obtained that information though a computer check of the vehicle registration number. The officer testified that he needed to know the identity of the owner to complete the tow report, but admitted that he would have used the information from the computer check rather than relying on anything defendant said.

In addition, statements at the police station, in which defendant said that he was on medication and was not supposed to drink, were properly found by the trial court to have been the result of custodial interrogation. The officer testified that he could not recall most of the questions he asked during a 20-minute DUI observation period, and the court found it reasonable to infer that the officer questioned defendant concerning his medical condition. "Given defendant's admitted consumption of alcohol, any questions regarding his seizures and ingesting medication could have induced defendant to incriminate himself."

The trial court's suppression order was affirmed.

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[1]The record showed that defendant was in custody at the time of his statements and that **Miranda** warnings were never given.

**People v. Brannon**, 2012 IL App (2d) 111084 (No. 2-11-1084, modified 6/7/13)

1. Immediately after arresting defendant, the police found foil packets containing a powdery substance on the passenger seat of a car where defendant had been sitting. Without advising defendant of his **Miranda** rights, a police officer asked defendant, "Are you going to continue to lie to us about what you are doing?" Defendant responded, "No, it's my stuff."

Because there was no dispute that the defendant was in custody and that his statement was made in response to a question designed to elicit an incriminating response, the Appellate Court agreed that the statement was inadmissible due to the absence of any **Miranda** warnings.

2. Defendant gave a much more comprehensive and detailed statement at the police station over an hour later after being advised of his rights.

This statement was not obtained by deliberate use of a question-first, warn-later technique to circumvent **Miranda**. Evidence to be considered in determining whether the police conduct was deliberate include: the officer's testimony, the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the prewarning and post-warning statements.

The circumstances support the inference that the first interrogation was spontaneous and not part of a deliberate plan to avoid **Miranda**. There is no indication that the officers operated from a policy of question first, warn later. The questioning occurred as part of an on-the-street encounter in a high-crime area involving an uncooperative defendant. The police were trying to determine whether and to what extent the driver or the defendant passenger was involved in the drug offenses. This is borne out by their decision to arrest defendant and to allow the driver to leave. The prewarning interrogation consisted of one question designed to get defendant to tell the truth, as compared to the more extensive and focused post-warning interrogation. The prewarning statement was vague while the post-warning statement was specific and pertained to defendant's involvement in drug dealing as opposed to mere possession. While the same officers were involved in both interrogations, this factor alone is insufficient to show that the officers' conduct was deliberate.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

**People v. Campbell**, 2014 IL App (1st) 112926 (1-11-2926, 4/23/14)

Under **McNeil v. Wisconsin**, 501 U.S. 171 (1991) and **People v. Villalobos**, 193 Ill. 2d 229, 737 NE2d 639 (2000), an anticipatory exercise of the right to counsel does not invoke the **Miranda** right to counsel so as to prevent later custodial interrogation. Instead, **Miranda** is invoked only where at the time of the request, the suspect is both in custody and either subject to interrogation or under an imminent threat of interrogation.

Defendant testified that while he was restrained in his home as a search warrant was executed, he asked an officer whether he was under arrest. When he was told that he would be arrested, defendant stated that he wanted to talk to a lawyer. The court concluded that even if defendant's testimony was believed, a request for counsel under these circumstances did not effectively invoke **Miranda** because defendant had not been arrested and was not being subjected to questioning. In order to preclude a subsequent interrogation at the police station, therefore, defendant was required to repeat his request when police initiated an interrogation.

(Defendant was represented by Assistant Defender Rob Markfield, Chicago.)

**People v. Hunt**, 403 Ill.App.3d 802, 939 N.E.2d 1039 (1st Dist. 2010)

The due process clause of the Illinois Constitution requires that the police inform a

suspect that his attorney is present in the police station and asking to see him. Where the police fail to communicate that information, defendant has not validly waived his right to counsel guaranteed by the Illinois constitutional right against self-incrimination. **People v. McCauley**, 163 Ill. 2d 414, 645 N.E.2d 923 (1994).

Defendant was in custody on an unrelated charge. The police transferred him from the county jail to the police station where they arranged a meeting between defendant and a police informant. Their conversations were monitored and recorded by the police with judicial authorization. Shortly after their conversations began, an attorney who represented defendant on his unrelated charge appeared at the station and asked to speak with the defendant. He was not allowed to speak with the defendant until 45 minutes after his arrival at the station, following which he and defendant informed the police that defendant was invoking his right to remain silent and to consult with counsel. A week later, defendant was brought back to the police station and two more conversations with the informant were monitored and recorded.

1. Relying on **People v. Perkins**, 248 Ill.App.3d 762, 618 N.E.2d 1275 (5th Dist. 1993), and 725 ILCS 5/103-2.1, the Appellate Court found that defendant was subject to custodial interrogation on both occasions as a matter of state law because he was involuntarily transported to the police station to be interrogated by an undercover police agent who asked questions likely to elicit an incriminating response.

2. Since there was custodial interrogation, the police had no power to prevent or delay communication of defendant and his lawyer during the first interrogation by the informant.

3. Because defendant invoked his right to counsel at the first interrogation, defendant had a right to consult with his counsel prior to the second interrogation, and was denied that right when there was no consultation.

4. The custodial interrogations were also conducted in violation of defendant's state constitutional right not to be held incommunicado and his state constitutional and statutory rights to counsel. Ill.Const. 1970, Art. I, §§2, 10; 725 ILCS 5/103-4.

The Appellate Court affirmed suppression of the last 45 minutes of the first interrogation and the entirety of the interrogations that were conducted a week later.

**People v. McCarron**, 403 Ill.App.3d 383, 934 N.E.2d 76 (3d Dist. 2010)

1. The police need to provide **Miranda** warnings to a person they seek to question only if the person is in custody. The determination of whether an individual is in custody is an objective one, which requires a court to examine the totality of the circumstances and assess whether a reasonable person in that situation would have felt free to terminate the encounter with the police.

The court determined that defendant was not in custody and therefore the police did not need to **Mirandize** the defendant when they questioned her at the hospital. Defendant was a 37-year-old pathologist who was suffering from depression, but was lucid and coherent. Following a suicide attempt, she had been brought to the hospital by ambulance accompanied by her mother and a police officer. The officer asked her no questions. She was not arrested, restrained, or placed under police guard at the hospital. The first officer who spoke to her at the hospital left after defendant told him that she had admitted to her husband that she had killed her daughter, but indicated that was all she wanted to say. Two other officers who attempted to question defendant told her she was not under arrest and also left when defendant said she did not want to talk. Defendant told those officers that they could return the next day and defendant told a friend that she intended to confess to the police the next day. The following day, defendant's husband and a DCFS representative were present when defendant did make a statement to the police. The circumstances of that interview were not

coercive. Therefore a reasonable person in defendant's position would have felt free to terminate the encounter with the police.

2. A question-first, warn-later strategy occurs where the police elicit an incriminating response from an individual without providing **Miranda** warnings, then provide the **Miranda** warnings and again elicit an incriminating statement. When the police deliberately use this technique, any statement made following the **Miranda** warnings is inadmissible, absent curative measures.

The court concluded that a second statement made by defendant to the police one hour after the first statement, and preceded by **Miranda** warnings, was admissible because the police did not act deliberately to circumvent **Miranda**. The police did not act forcefully in obtaining a statement from defendant in the period of time between the offense and the first statement. The police intended to obtain only one statement from defendant. The second statement was taken only because the first statement was not recorded and the State's attorney requested a recorded statement.

**People v. Wright**, 2011 IL App (4th) 100047 (No. 4-10-0047, 9/16/11)

1. Under **Miranda v. Arizona**, statements made in response to interrogation are inadmissible unless the suspect was warned of his Fifth Amendment rights. A suspect is "in custody" for **Miranda** purposes where a reasonable person who is innocent of any crime would have felt at liberty to terminate the interrogation and leave. Among the factors determining whether a statement was "custodial" are the location, time, length, mode, and mood of the questioning; the number of police officers present; the presence or absence of the suspect's family and friends; any *indicia* of a formal arrest (such as the display of weapons or force, physical restraint, booking, or fingerprinting); the process by which the individual arrived at the place of questioning; and the age, intelligence, and mental makeup of the accused.

Although **Miranda** applies to a traffic stop in which the defendant is subjected to restraints comparable to those associated with a formal arrest, the mere fact that the defendant is detained during a traffic stop does not equate to custody for **Miranda** purposes.

2. The court concluded that a defendant suspected of DUI was not "in custody" where he was transported in the rear seat of a squad car, by an officer who had arrested him on previous occasions, to a nearby location where defendant had parked his SUV. The court found that defendant voluntarily entered the car, sat uncuffed with the rear windows open, and knew that he was being taken only a short distance. The court also stressed that defendant was not subjected to any restraints comparable to those associated with a formal arrest.

Because defendant was not in custody, his statements were admissible despite the absence of **Miranda** warnings.

3. The court noted that under Fourth District precedent, a trial court can conclude that the defendant was "in custody" only if it finds both that the defendant subjectively believed that he was in custody and that a reasonable innocent person in defendant's position would have believed that he was in custody. If the suspect testifies that he did not believe that he was in custody during the questioning, the trial court need not consider whether a reasonable person would have believed himself to be in custody. See **People v. Goyer**, 265 Ill.App.3d 160, 638 N.E.2d 390, 393 (4th Dist. 1994).

Although the defendant failed to testify that he believed he was in custody, the State failed to raise the **Goyer** issue before the trial court. Therefore, the Appellate Court declined to reach this issue.

4. The court rejected defendant's argument that the toxicology test results of blood and

urine samples which defendant provided should have been excluded because the officer failed to tell defendant that he could refuse to give the samples. A defendant who has been arrested for DUI has no constitutional right to refuse chemical testing. Furthermore, police inquiry into whether a suspect will submit to a blood alcohol test does not constitute "interrogation" within the meaning of **Miranda**.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

Top

**§10-3(b)**
**Non-Police Interrogation**

**People v. Hunt**, 2012 IL 111089 (No. 111089, 4/19/12)

1. **People v. McCauley**, 163 Ill. 2d 414, 645 N.E.2d 923 (1994), held that there is no knowing waiver of the right to counsel when police, prior to or during custodial interrogation, refuse an attorney access to a suspect if the suspect has not been informed that the attorney was present and sought to consult with him. This rule is based on the Illinois constitutional guarantees against self-incrimination and to due process. Ill. Const. 1970, art. I, §§2, 10.

**McCauley** superimposed a state-specific right onto the existing **Miranda** framework. The constitutional justification for the **Miranda** regime is police custodial interrogation. **McCauley** did not reject this foundation by taking the police out of the equation. Accordingly, like a suspect's **Miranda** rights, a suspect's **McCauley** right arises only during police custodial interrogation.

2. Defendant was not subjected to police custodial interrogation when he had a conversation with an undercover informant and fellow inmate. Therefore, both **Miranda** and **McCauley** are inapplicable.

3. The court expressly overruled **People v. Perkins**, 48 Ill. App. 3d 762, 618 N.E.2d 1275 (5th Dist. 1993), which held that where a suspect has asserted his fifth amendment right to counsel, he cannot be questioned by undercover agents on a separate, unrelated, and uncharged offense while in jail, without the presence of an attorney and an opportunity to waive counsel. As the United States Supreme Court held in **Illinois v. Perkins**, 496 U.S. 292 (1990), **Miranda** warnings were not required because the defendant was not subjected to police custodial interrogation. It follows that defendant had no fifth amendment right to counsel. It was irrelevant that he requested counsel when he was arrested for an unrelated offense.

**People v. Hunt**, 403 Ill.App.3d 802, 939 N.E.2d 1039 (1st Dist. 2010)

The due process clause of the Illinois Constitution requires that the police inform a suspect that his attorney is present in the police station and asking to see him. Where the police fail to communicate that information, defendant has not validly waived his right to counsel guaranteed by the Illinois constitutional right against self-incrimination. **People v. McCauley**, 163 Ill. 2d 414, 645 N.E.2d 923 (1994).

Defendant was in custody on an unrelated charge. The police transferred him from the county jail to the police station where they arranged a meeting between defendant and a police informant. Their conversations were monitored and recorded by the police with judicial authorization. Shortly after their conversations began, an attorney who represented defendant on his unrelated charge appeared at the station and asked to speak with the defendant. He

was not allowed to speak with the defendant until 45 minutes after his arrival at the station, following which he and defendant informed the police that defendant was invoking his right to remain silent and to consult with counsel. A week later, defendant was brought back to the police station and two more conversations with the informant were monitored and recorded.

1. Relying on **People v. Perkins**, 248 Ill.App.3d 762, 618 N.E.2d 1275 (5th Dist. 1993), and 725 ILCS 5/103-2.1, the Appellate Court found that defendant was subject to custodial interrogation on both occasions as a matter of state law because he was involuntarily transported to the police station to be interrogated by an undercover police agent who asked questions likely to elicit an incriminating response.

2. Since there was custodial interrogation, the police had no power to prevent or delay communication of defendant and his lawyer during the first interrogation by the informant.

3. Because defendant invoked his right to counsel at the first interrogation, defendant had a right to consult with his counsel prior to the second interrogation, and was denied that right when there was no consultation.

4. The custodial interrogations were also conducted in violation of defendant's state constitutional right not to be held incommunicado and his state constitutional and statutory rights to counsel. Ill.Const. 1970, Art. I, §§2, 10; 725 ILCS 5/103-4.

The Appellate Court affirmed suppression of the last 45 minutes of the first interrogation and the entirety of the interrogations that were conducted a week later.

Top

**§10-3(c)**
**"In custody"**

**Howes v. Fields**, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-680, 2/21/12)

1. Under **Miranda v. Arizona**, a suspect who is subjected to custodial interrogation must be informed before the interrogation that he has the right to remain silent, that any statement he makes may be used as evidence, and that he has the right to retained or appointed counsel. Under existing precedent, a person is in "custody" for **Miranda** purposes where, under all of the circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. Relevant factors in determining whether a suspect is in "custody" include the location and duration of the questioning, "statements made during the interview," the presence or absence of physical restraints, and whether the suspect is released at the end of the questioning.

2. The court rejected the rule adopted by the Sixth Circuit Court of Appeals – that removing a prisoner from the general prison population and questioning him about criminal conduct which occurred outside the prison is necessarily custodial for **Miranda** purposes. The court stressed that whether questioning of a prisoner constitutes "custody" is determined under all of the circumstances, not merely by the fact that the prisoner is incarcerated on an unrelated conviction and is questioned in private. A prisoner is not in "custody" for **Miranda** purposes if he is free to terminate the interrogation and return to general population.

The court stressed that the relevant question in applying **Miranda** in contexts other than station house questioning is whether the environment creates an inherently coercive atmosphere similar to that which led to the rule in **Miranda**. The court noted three reasons that the mere fact of imprisonment does not create an inherently coercive atmosphere: (1)

questioning an inmate does not usually create the type of shock which often accompanies an arrest; (2) a person who is already serving a sentence is unlikely to speak to officers out of a desire to obtain a prompt release; and (3) a prisoner likely knows that law enforcement officers who question him on unrelated charges lack authority to affect the duration of his current sentence. The court also noted that questioning a prisoner in private does not have the same coercive effect as questioning a suspect outside the presence of supportive friends or family; "[f]ellow inmates are by no means necessarily friends."

3. Considering all of the circumstances here, the defendant was not in "custody" for **Miranda** purposes when he was questioned concerning alleged criminal activity which occurred before he was incarcerated. The court acknowledged that several factors favored a finding that defendant was in custody. First, defendant did not invite or consent to the questioning, and was not told that he was free to decline to speak with the deputies. Second, the interview lasted between five and seven hours and continued past the hour when defendant usually went to bed. Third, the deputies who questioned the respondent were armed. Fourth, one of the deputies used a sharp tone and profanity.

The court concluded, however, that the above factors were offset by several others - defendant was told several times that he could go back to his cell whenever he wanted, he was not threatened or physically restrained, the interview occurred in a well-lighted, averaged-sized room where the door was left open some of the time, and defendant was offered food and water. The court concluded that under these circumstances, a reasonable person would have felt free to terminate the interview and ask to be returned to his cell.

The court acknowledged that defendant could not return to his cell on his own, but would have to await an escort. This fact did not make the interrogation custodial, however, because prisoners are not free to roam about the prison for any reason and would have no reasonable expectation of doing so.

Because the defendant was not in custody for **Miranda** purposes, the officers who questioned him did not err by failing to give **Miranda** warnings before interrogating him about alleged criminal behavior which occurred before his incarceration.

**J.D.B. v. North Carolina**, ___ U.S. ___, 131 S.Ct. 2394, ___ L.Ed.2d ___ (2011) (No. 09-11121, 6/16/11)

1. Under **Miranda v. Arizona**, 384 U.S. 436 (1966), persons who are subjected to custodial police interrogation are entitled to be warned that they have the right to remain silent, that any statement they make may be used as evidence, that they have the right to have an attorney present, and that if they are indigent an attorney will be appointed to represent them. Whether a suspect is "in custody," and therefore entitled to such warnings, is determined under an objective test which considers whether a reasonable person under the circumstances surrounding the interrogation would have felt free to terminate the questioning. The subjective beliefs of the interrogating officers and the suspect are irrelevant to whether the suspect is "in custody."

2. Because children are less mature and responsible than adults and are more susceptible to the pressures of custodial interrogation, a child's age is relevant to determining whether interrogation is "custodial." The court noted, however, that age is a relevant consideration only if known to the officer at the time of the questioning or if the child's age would have been apparent to a reasonable officer.

The cause was remanded to determine whether a 13-year-old seventh grader was "in custody," and therefore entitled to **Miranda** warnings, where he was removed from class, taken to a closed conference room with two police officers and two school administrators, and

questioned about criminal activity.

**In re D.L.H., JR.**, 2015 IL 117341 (No. 117341, 5/21/15)

1. A person is in custody for **Miranda** purposes where the circumstances surrounding the interrogation would cause a reasonable person, innocent of wrongdoing, to believe that he was not at liberty to terminate the interrogation and leave. Courts look to several factors in making this determination: (1) the location, time, mood, and mode of questioning; (2) the number of officers present; (3) the presence of family and friends; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking, or fingerprinting; (5) how the defendant arrived at the interrogation site; and (6) the age, intelligence, and mental makeup of the defendant. The reasonable person standard is modified to take account of a defendant's juvenile status.

The Court found that under the facts of this case, the nine-year-old defendant, who had significant intellectual impairments, was not in custody for purposes of **Miranda**. The interrogations took place in familiar surroundings - at the kitchen table of his home. Only one officer was present. He wore his service weapon but was not in uniform. And he used a conversational tone during the questioning. Defendant's father was present. The interrogations each lasted 30-40 minutes and took place in the early evening.

Defendant's age, intelligence and mental makeup favored a finding of custody, but was only one factor, and defendant did not ask the Court to adopt a bright-line rule that all nine-year-old defendants are necessarily and always in custody. The officer was unaware of defendant's intellectual impairments and the **Miranda** custody analysis does not require officers to consider circumstances that are unknowable to them. Accordingly, defendant was not in custody and **Miranda** warnings were not required.

2. In determining whether a statement is voluntary, courts consider the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation. Defendant's characteristics include: age, intelligence, background, experience, mental capacity, education, and physical condition at the time of the questioning. Details of the interrogation include: legality and duration of the detention, duration of the questioning, provision of **Miranda** warnings, physical or mental abuse, threats or promises, and the use of trickery, deception, or subterfuge.

In the case of a juvenile, the presence of a concerned adult is a relevant factor, and "the greatest care must be taken to assure that the admission is voluntary." In light of these concerns, the Court viewed a defendant's age as a key factor in deciding whether statements were voluntary. Unlike the **Miranda** custody analysis, which considers a hypothetical reasonable juvenile, the voluntariness analysis asks whether the statements of a particular juvenile were voluntary.

Here defendant gave two statements after two separate interrogation sessions. The Court found that the first statement was voluntary, while the second statement was not.

At the time of the suppression hearing, the trial court had already found defendant unfit to stand trial since he was unable to understand the nature and purposes of the proceedings or assist in his defense. The expert who interviewed defendant and prepared a fitness report concluded that defendant's cognitive abilities were only at the seven-to-eight year-old level. The Court found that these characteristics of defendant would "color the lens" through which it would view the circumstances of the interrogations.

3. Concerning the first interrogation and statement, the Court found that despite defendant's young age and "even younger mental age," the statement was voluntary. The questioning was non-custodial, of short duration, and was conducted in a conversational and

non-accusatory manner. The officer made no threats and his questions did not suggest answers. Defendant's father was at his side and provided "sage advice" about not making any admissions.

4. The Court, however, found that the second statement was not voluntary. Before the second interrogation began, the officer asked defendant's father to move away from the kitchen table where the interrogation was taking place. Although the officer continued using a conversational tone, he gave two long monologues designed to play on defendant's fear that his father or other relatives would go to jail, and falsely assured defendant that no consequences would attach to an admission of guilt. Although an adult might have been left "cold and unimpressed" by the officers tactics, the Court found that a nine-year-old with defendant's level of intellectual functioning would have been far more vulnerable to these tactics.

The Court suppressed the second statement and remanded the cause to the Appellate Court to conduct a harmless error analysis on the erroneous admission of that statement.

**In re Marquita M.**, 2012 IL App (4th) 110011 (No. 4-11-0011, 6/13/12)

**Miranda** warnings are required whenever an accused is subject to custodial interrogation. "Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. A person is in custody for **Miranda** purposes where in the circumstances, a reasonable person who is innocent of any crime would not have felt at liberty to terminate the interrogation and leave.

Courts look at several factors to determine whether a statement was made in a custodial setting: (1) the location, time, length, mood, and mode of questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. A child's age, when known or objectively apparent to a reasonable officer, is also a relevant consideration.

The 15-year-old respondent was not in custody when she was escorted from her classroom by the freshman dean of students and a police liaison officer, and questioned in the dean's office about having a knife at school. She was not taken to a police station or physically restrained. Only one officer was present and nothing indicates the officer made any show of force. No formal booking procedure or search of her person occurred. The questioning was of limited duration and respondent was not badgered. The officer's use of a hypothetical during the questioning was merely inquisitory and not accusatory. A reasonable person in these circumstances would not have felt that she was in police custody.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

**People v. Beltran**, 2011 IL App (2d) 090856 (No. 2-09-0856, mod. op. 9/14/11)

1. In determining whether a defendant is in custody for purposes of **Miranda**, the court must consider whether under all of the circumstances, a reasonable, innocent suspect would have felt free to terminate the interrogation and leave. Among the relevant factors are: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present; (3) the presence or absence of family or friends of the suspect; (4) any *indicia* of a formal arrest; (5) the manner by which the individual arrived at the place in question; (6) the age, intelligence, and mental make up of the accused, and (7) whether the suspect has any

reason to believe that she is the focus of a criminal investigation. No single factor is dispositive.

2. The court concluded that defendant was not in custody during a videotaped interview conducted in her hospital room. Defendant had been involuntarily admitted to a mental health hospital after suffering an "acute psychological breakdown" in the emergency room when told that her daughter was dead.

The court found only one factor indicating that defendant was in custody – she had reason to believe that she would be a target of a criminal investigation after her daughter died due to a brutal beating in the defendant's home. However, the court found that all other factors rebutted the conclusion that she was in custody:

A. ***Location*** - A hospital room is a neutral surrounding which does not present the same pressure as a police station or other law enforcement facility. The court also rejected the argument that defendant was in custody because she was questioned after having been involuntarily committed to a mental health hospital after attempting suicide during a psychological "episode" in the emergency room. The court found that only restraints imposed by law enforcement officers are relevant to determining whether a suspect is "in custody" for **Miranda** purposes. Here, the decision to involuntarily admit defendant was made by medical personnel, without any involvement by police.

B. ***Time, length, mood, and mode of questioning*** - Although the defendant was questioned at 5:45 a.m., neither her appearance on the videotape nor her statements suggested that she was too tired to participate. The interview lasted 45 minutes, which the court found was not excessive for a noncustodial interview.

In addition, defendant was told before the interview began that she did not have to talk to the officers, and the officers did not badger her or employ a hostile or accusatory tone.

C. ***The number of police officers present*** - Although four officers were present, only two asked questions.

D. ***The presence or absence of family or friends of the suspect*** - Although none of defendant's family or friends were present during the questioning, none were present when police arrived. In other words, this was not a situation in which police excluded family or friends in order to create a situation in which the suspect was more likely to confess.

E. ***Any indicia of a formal arrest*** - There was no *indicia* of a formal arrest; defendant was not booked, fingerprinted, or handcuffed, and no guard was posted outside her room. Although the officers read defendant her **Miranda** rights and said that they had a search warrant, neither factor creates a custodial situation, especially where the defendant was informed shortly thereafter that she did not have to answer questions.

F. ***The manner by which the individual arrived at the location of the questioning*** - Defendant came to the hospital of her own accord while seeking emergency care for her daughter, and not because she had been arrested and taken there by police.

G. ***The age, intelligence, and mental make up of the accused*** - Although one expert found that defendant's IQ was only 79, the trial court did not abuse its discretion by finding that a second expert, who concluded that defendant was of average intelligence, was more credible. Furthermore, although defendant had been administered Haldol, a psychotropic medication, on the previous night, neither the video nor the transcripts indicated that she was suffering any adverse effects of the drug during the questioning.

The court acknowledged that defendant had undergone a psychotic breakdown a few hours before she was questioned, but found that her condition was not exploited by the officers in order to extract a confession. Before entering defendant's room, the officers asked a nurse if defendant would be able to talk with them. In addition, they explicitly advised defendant

that she did not have to speak with them. Finally, defendant's statements that she did not want to talk to the police were equivocal and not a clear indication that she wanted to end the interview.

3. The court rejected the argument that the police officers used the "question first, **Mirandize** later" technique prohibited by **Missouri v. Seibert**, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Because defendant was not in custody at the time of the hospital interview, **Seibert** did not apply.

4. The court also rejected the argument that statements which defendant made six days later, after she had been released from the hospital, should have been suppressed. Because defendant was not in custody during the initial statements in the hospital, the later interrogation was not an extension of impermissible questioning in the hospital.

Furthermore, the second interrogation was not improper because just before reading defendant her **Miranda** rights, the officers stated that **Miranda** rights "[don't] mean anything . . . just like [when] I read them to you at the hospital." The officer testified that he used such language to put defendant "at ease" and not to convey the impression that her rights were meaningless. Although the court found that the officer's statements were inappropriate, it found no indication in the record that defendant's failure to exercise her rights was related to those statements.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

**People v. Campbell**, 2014 IL App (1st) 112926 (1-11-2926, 4/23/14)

The Appellate Court concluded that defendant was subjected to custodial interrogation when police officers who were executing a search warrant asked whether there was contraband in a bedroom where she was being taken to retrieve her child. Therefore, **Miranda** warnings should have been given.

1. To determine whether a defendant is in custody, the court must decide whether a reasonable person in defendant's position would have felt that he or she was at liberty to terminate the interrogation and leave. The court should consider the location, time, length, mood, and mode of the questioning; the number of police officers present; the presence or absence of family and friends; any indicia of a formal arrest procedure; the manner by which the individual arrived at the place of the questioning; and the age, intelligence, and mental makeup of the accused.

2. Here, police who were executing a search warrant entered the home by force and with their weapons drawn, and gathered most of the home's inhabitants in the living room. Defendant asked to be allowed to retrieve her baby from a bedroom, and was escorted to the door of the room after a supervisor gave permission. Before allowing defendant to retrieve the child, the officer asked whether there was anything in the room that "police should know about."

The court concluded that a reasonable, innocent person in defendant's position would have been unlikely to think that she could simply refuse to answer the question and retrieve her child from the room. Instead, the police deprived defendant of freedom of action in a significant way by restricting her ability to attend to her child. Under these circumstances, defendant was in custody when the question about contraband was asked. Therefore, **Miranda** warnings should have been given.

The court rejected the argument that the question did not amount to "interrogation," but was instead a typical question to be asked at the scene of an encounter. A question at the scene of a crime qualifies as "interrogation" if it is reasonably likely to elicit an incriminating response. Although the officer testified that he was concerned there might be weapons in the

room, the court noted that he asked about all contraband and did not limit his inquiry to weapons.

Because the defendant was subjected to custodial interrogation, the trial court erred by denying the motion to suppress her statement that there was cocaine in the room.

3. The court concluded that the error was not harmless beyond a reasonable doubt. There were other persons in the home, and absent the confession defendant might have been able to persuasively argue that other occupants had hidden cocaine in the room when they heard the police entering the house.

Defendant's conviction for possession of cocaine was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

**People v. Chestnut**, 398 Ill.App.3d 1043, 921 N.E.2d 811 (4th Dist. 2010)

The Appellate Court affirmed the trial court's order granting defendant's motion to suppress evidence which the officers found during a search of the defendant. Defendant came to a house where a search warrant was being executed, and eventually consented to a search of his person.

1. Under **Michigan v. Summers**, 452 U.S. 692 (1981), a police officer has limited authority to detain occupants of premises that are being searched, in order to ensure that the occupants are unarmed and uninvolved in any criminal activity. It has been held that under **Summers**, the term "occupants" includes individuals who approach the premises while a search warrant is being executed. (See **U.S. v. Jennings**, 544 F.3d 815 (2008)).

However, "custodial interrogation" of persons seized under **Summers** is permitted only if there is an articulable basis for suspecting criminal activity. Because the police had no reasonable suspicion that defendant was engaged in criminal activity, **Summers** allowed them to ask only for defendant's identity and an explanation of his reasons for being on the property. They could not ask incriminating questions, including whether defendant was in possession of controlled substances.

2. The court concluded that the interrogation of the defendant was "custodial," because a reasonable person would not have believed that he was free to leave. The court stressed that police asked whether defendant was in possession of controlled substances, one of the officers testified that defendant was not free to leave, defendant was prevented from leaving because one officer was standing in front of him and another to his rear and in front of the door through which he would have to exit, and defendant was restricted to the porch of the house. Because there was no basis to suspect criminal activity, the custodial questioning was not justified under **Summers**.

3. The court also noted that because the police engaged in custodial interrogation, **Miranda** warnings were required. (See also **APPEAL**, §2-7(a) & **SEARCH & SEIZURE**, §§44-4(b), 44-8(b), 44-11(b)).

**People v. Coleman**, 2015 IL App (4th) 140730 (No. 4-14-0730, 7/20/15)

1. To determine whether a defendant is in custody for **Miranda** purposes, courts look at the circumstances surrounding the interrogation and determine as an objective matter whether a reasonable innocent person would have felt at liberty to terminate the interrogation and leave. Courts utilize the following factors in making this determination: (1) location, time, length, mood and mode of the questioning; (2) number of police officers present; (3) presence of defendant's family and friends; (4) indicia of formal arrest, such as show of weapons or force, physical restraint, booking, or fingerprinting; (5) how defendant arrived at the place of

questioning; (6) age, intelligence, and mental makeup of defendant.

2. Two parole officers visited defendant's home to conduct a "compliance check" on defendant. The officers suspected defendant had been dealing drugs based on information they received prior to the compliance check. Both officers carried weapons, but were not general criminal investigators. If they discovered evidence of a new crime they contacted the local police. It was standard procedure to handcuff parolees during compliance checks, but the officers never gave **Miranda** warnings during these checks.

The officers separated defendant from his mother and sister, who were in another room. They obtained a urine sample from defendant and searched his bedroom. They found a locked box in the bedroom which contained a large amount of money. After finding the money, the officers handcuffed defendant behind his back. They then questioned defendant about the money and selling marijuana. In response, defendant admitted he had marijuana under his mother's bed, which the officers recovered.

Defendant specifically testified that he believed he was free to leave during the questioning, despite being handcuffed, because he "hadn't done anything wrong."

3. The Appellate Court held that defendant's statements were properly suppressed because the officers had not given him **Miranda** warnings. The court first held that although defendant was on parole, he still retained his Fifth Amendment rights, including the right to **Miranda** warning prior to custodial interrogation.

The court also found that defendant was in custody when the officers questioned him. Although the court discussed all of the relevant factors in determining custody, it found dispositive the fact that defendant was handcuffed after the officers found the large amount of money. When a law enforcement officer handcuffs an individual, the officer is "making a show of force and physically restraining" that person, actions "indicative of arrest." A reasonable person in this position would not "feel free to leave until the handcuffs are removed." Additionally, since defendant was handcuffed after the officers found the large amount of money, a reasonable person would have believed that the "parole visit had morphed into an arrest."

The court found that defendant's testimony that he subjectively believed he was free to leave was "irrelevant" to the **Miranda** question, which solely requires an objective determination of whether a reasonable person would feel free to leave.

The trial court's order suppressing defendant's statement was affirmed.

4. The dissenting justice would have found that because defendant subjectively believed he was free to leave, he was not subjected to custodial interrogation and **Miranda** warnings were not required.

(Defendant was represented by former Assistant Defender Duane Schuster, Springfield.)

**People v. Follis**, 2014 IL App (5th) 130288 (No. 5-13-0288, 6/6/14)

1. A suspect's statement is admissible in the State's case-in-chief only if the prosecution demonstrates by a preponderance of the evidence that defendant was given **Miranda** warnings and made a knowing and intelligent waiver of the privilege against self-incrimination. However, **Miranda** warnings are required only if the defendant is under "custodial interrogation." A suspect is "in custody" only if he is deprived of his freedom of action in a significant way.

Whether an interrogation is "custodial" depends upon whether a reasonable person in the defendant's position would believe that he was free to leave. Factors to be considered include: (1) the location, time, length, mood, and mode of the interrogation, (2) the number of

police officers present, (3) the presence or absence of family and friends of the accused, (4) any *indicia* of formal arrest, and (5) the age, intelligence, and mental makeup of the accused.

The question of custody focuses on the perceptions of the suspect and not on the intent of the interrogating officers. Suspects who are mentally challenged not only tend to be more susceptible to police coercion during an interrogation, but are also "more susceptible to the impression that they are, in fact, in custody in the first instance."

2. The trial court did not err by finding that a reasonable person in defendant's position would have believed that he was in custody when he confessed to the offense of predatory criminal sexual assault of a child. Defendant knew that he was being investigated by the Department of Children and Family Services concerning serious allegations, and he had been removed from his home by police a month earlier so DCFS could investigate. He knew that the officers had come to his home twice on the date in question, and he fled before deciding to return and submit to questioning.

Defendant was transported to the police station by squad car, although the officers stated that he was not in custody. None of defendant's family members were at the station during the interrogation.

Defendant was 18 years old and suffered from diminished mental capacity. He had dropped out of school in the tenth grade, and expert testimony described him as scoring in the bottom 1% of the population intellectually and having the cognitive abilities of a ten-year-old.

The interview took place in a small room with the doors shut. Defendant was interrogated for more than an hour before he made any incriminating statements, and the trial court found that the officers asked "very leading and suggestive questions." In fact, one of the officers was "uneasy due to the nature of the questioning and the tactics that were used."

The court concluded that under these circumstances, the trial court did not err by finding that defendant was in custody during the interrogation.

(Defendant was represented by Assistant Defender Amanda Horner, Mt. Vernon.)

**People v. Fort**, 2014 IL App (1st) 120037 (No. 1-12-0037, 4/30/14)

The Appellate Court concluded that defendant was subjected to custodial interrogation when police officers who were executing a search warrant asked whether there was contraband in a bedroom where she was being taken to retrieve her child. Therefore, **Miranda** warnings should have been given.

1. To determine whether a defendant is in custody, the court must decide whether a reasonable person in defendant's position would have felt that he or she was at liberty to terminate the interrogation and leave. The court should consider the location, time, length, mood, and mode of the questioning; the number of police officers present; the presence or absence of family and friends; any indicia of a formal arrest procedure; the manner by which the individual arrived at the place of the questioning; and the age, intelligence, and mental makeup of the accused.

2. Here, police who were executing a search warrant entered the home by force and with their weapons drawn, and gathered most of the home's inhabitants in the living room. Defendant asked to be allowed to retrieve her baby from a bedroom, and was escorted to the door of the room after a supervisor gave permission. Before allowing defendant to retrieve the child, the officer asked whether there was anything in the room that "police should know about."

The court concluded that a reasonable, innocent person in defendant's position would have been unlikely to think that she could simply refuse to answer the question and retrieve her child from the room. Instead, the police deprived defendant of freedom of action in a

significant way by restricting her ability to attend to her child. Under these circumstances, defendant was in custody when the question about contraband was asked. Therefore, **Miranda** warnings should have been given.

The court rejected the argument that the question did not amount to "interrogation," but was instead a typical question to be asked at the scene of an encounter. A question at the scene of a crime qualifies as "interrogation" if it is reasonably likely to elicit an incriminating response. Although the officer testified that he was concerned there might be weapons in the room, the court noted that he asked about all contraband and did not limit his inquiry to weapons.

Because the defendant was subjected to custodial interrogation, the trial court erred by denying the motion to suppress her statement that there was cocaine in the room.

3. The court concluded that the error was not harmless beyond a reasonable doubt. There were other persons in the home, and absent the confession defendant might have been able to persuasively argue that other occupants had hidden cocaine in the room when they heard the police entering the house.

Defendant's conviction for possession of cocaine was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

**People v. Hannah**, 2013 IL App (1st) 111660 (No. 1-11-1660, 6/3/13)

1. Under **Miranda**, a person who is subjected to custodial interrogation must be advised before the interrogation that he has the right to remain silent, that any statement he makes can be used as evidence against him, and that he has a right to an attorney and to the appointment of counsel if he is indigent. Generally, **Miranda** warnings are not required when police who are at the scene conduct general, investigatory questioning as to the facts surrounding a crime. The purpose of **Miranda** is to ensure that an inculpatory statement is the product of the suspect's free will and not the result of the compulsion inherent in custodial surroundings.

Whether a suspect is in custody for **Miranda** purposes depends on whether a reasonable person would have felt he was free to terminate the interrogation and leave. Among the factors to be considered are the location, time, length, mood and mode of questioning; the number of police officers present; the presence or absence of family and friends of the individual; any *indicia* of formal arrest such as the show of weapons or force, the use of physical restraints or subjecting the suspect to booking or fingerprinting; the manner by which the individual arrived at the place of questioning; and the age, intelligence, and mental makeup of the accused. No single factor is dispositive, and all factors must be considered.

2. Defendant was subjected to custodial interrogation where: (1) he was detained because he was on premises for which police were executing a search warrant, and (2) he was asked who owned a handgun that was found during the search. The court noted that the police forced their way into the residence to execute the search warrant, had their weapons drawn, searched and handcuffed the defendant and the other occupant, and physically moved defendant to a separate room where he was monitored by several police officers while the search was conducted. It was in the separate room that he was asked who owned the handgun found in a bedroom. The court concluded that no reasonable person would have felt free to refuse to answer the question or to terminate the encounter, and that defendant was not free to leave. Furthermore, the situation presented the inherent compulsion which is intended to be countered by the **Miranda** warning requirement. Under these circumstances, **Miranda** warnings were required before defendant was asked about ownership of the handgun.

The court rejected the State's argument that defendant was not "in custody" because he was merely detained while the search warrant was executed. Unlike this case, the precedent relied upon by the State involved defendants who were not handcuffed at the time of questioning.

The court also rejected the argument that under **People v. Colyar**, 2012 IL 111835, handcuffing a defendant for the safety of officers does not constitute "custody" under **Miranda**. In **Colyar**, the issue was whether the defendant was "seized" in violation of the Fourth Amendment where he was handcuffed and searched after a bullet was observed in plain view inside a vehicle. Here, the issue was whether, under the Fifth Amendment, a person who is detained while a search warrant is being executed is "in custody" for **Miranda** purposes.

The court also rejected the argument that the case fit within the "public safety" exception to **Miranda**. Due to overriding considerations of public safety, the public safety exception permits police to dispense with **Miranda** warnings before asking questions devoted solely to locating an abandoned weapon. **New York v. Quarles**, 467 U.S. 649 (1984). Here, defendant was interrogated after the firearm was recovered, when there was no safety risk to the officers. Furthermore, the question asked of defendant did not aid the police in recovering the weapon or executing a search warrant, and therefore was not general on the scene questioning concerning the facts of the crime. Instead, it was a question which was reasonably likely to elicit an incriminating response, and therefore constituted interrogation.

3. Because defendant's incriminatory statement was obtained in violation of **Miranda**, the trial court erred by denying the motion to suppress. However, the court concluded that the error was harmless where the defendant subsequently made a second incriminating statement regarding his ownership of the handgun after he was advised of his **Miranda** rights at the police station. Therefore, the conviction was affirmed.

**People v. Harris**, 2012 IL App (1st) 100678 (No. 1-10-0678, 8/30/12)

1. An individual subjected to custodial interrogation is entitled to have retained or appointed counsel present during the questioning. If the accused requests counsel at any time during the interrogation, she cannot be subject to further questioning unless a lawyer has been made available or the suspect reinitiates conversation. **Edwards v. Arizona**, 451 U.S. 477 (1981).

Whether defendant actually invoked her right to counsel is an objective inquiry, which at a minimum requires some statement that can reasonably be construed as an expression of a desire for counsel. A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning.

2. Defendant asked if it was "possible" to "have a few days to get an attorney," to which the officer responded, "No." Defendant began to ask, "How long can I —" but was interrupted by the officer who momentarily left the holding cell. On his return, the officer asked whether defendant was requesting an attorney, because if she was they were "done talking." Defendant responded that she did not know how she could make a call because "all my [phone] numbers is at the county." Defendant then agreed to answer questions.

3. Defendant's query whether it was possible to have some time to get an attorney was an unequivocal invocation of her right to counsel. Any ambiguity in her statement was only with regard to how long it would take and the process of acquiring an attorney, not with regard to whether she wanted one. She answered further questions only at the officer's prompting. Therefore, the statements made by defendant after her invocation of her right to counsel, including her recorded statements, were inadmissible.

4. Any statement made as a result of custodial interrogation at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in a murder case unless it is electronically recorded. 725 ILCS 5/103-2.1(b). If the trial court finds by a preponderance of the evidence that this provision was violated, any statements made by the defendant during or following that non-recorded custodial interrogation are presumed inadmissible, even if those statements were obtained in compliance with §103-2.1(b). 725 ILCS 5/103-2.1(d). It is irrelevant that the police did not willfully violate §103-2.1(b). The presumptive inadmissibility of such statements can be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. 725 ILCS 5/103-2.1(f).

5. Under the statute, a custodial interrogation occurs when a reasonable person in the suspect's position would consider herself in custody and is presented with a question reasonably likely to elicit an incriminating response. 725 ILCS 5/103-2.1(a). The statute thus codifies the common-law definition of custodial interrogation developed by **Miranda v. Arizona**, 384 U.S. 436 (1966), and its progeny. Both **Miranda** and §103-2.1 serve a protective purpose, and therefore **Miranda** case law can serve as guidance in interpreting §103-2.1.

Factors relevant to the determination whether a defendant is in custody include: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the person; (4) any indicia of formal arrest procedures, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. A court must determine whether a reasonable person, innocent of any crime, would have believed that she could terminate the encounter and was free to leave.

6. Factors (1), (3), and (5) demonstrate that defendant was unquestionably subject to custodial interrogation. The police picked her up from a friend's house after midnight, after searching for her for more than a week, and transported her in an unmarked squad car to the station. There she was placed alone in an interview room that was likely locked. At the station, defendant admitted she had given the police a false name because she had an outstanding warrant for her arrest on a probation violation. Once the police confirmed this, defendant was not free to leave.

The Appellate Court was not persuaded by the State's argument that defendant was in custody on the probation violation and not the murder. "[T]he only fair reading of the circumstances in the record is that the police held the defendant in continued custody on the probation violation and, at best, used this custody to mask their intention to question her solely about the murder." Defendant was subjected to five interviews over 24 hours that were conducted with a confrontational mood of questioning, and the police did not convey that defendant could decline to answer questions. "This was more than mere investigatory questioning; it was custodial interrogation of a murder suspect."

7. Because defendant made an incriminating statement as a result of custodial interrogation at the police station, her statement was presumptively inadmissible because it was not electronically recorded. This presumption was not overcome because the State presented no evidence related to the voluntariness of the unrecorded statement. That evidentiary gap was not filled by evidence of the subsequent videotaped statements. The Appellate Court directed that a determination be made whether defendant's unrecorded statement was voluntary and reliable prior to retrial.

Defendant's felony murder conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

**People v. Havlin**, 409 Ill.App.3d 427, 947 N.E.2d 893 (3d Dist. 2011)

The determination of whether defendant is in custody for **Miranda** purposes involves two inquiries: (1) what were the circumstances surrounding the interrogation, and (2) would a reasonable person have felt he was not at liberty to terminate the interrogation and leave? When examining the circumstances surrounding the interrogation, the court should consider the following factors: the location, time, length, mood, and mode of the interrogation; the number of officers present; the presence or absence of family and friends of the accused; any indicia of formal arrest; and the age, intelligence, and mental makeup of the accused.

The mere fact that an accused is not free to leave during a traffic stop or an investigation does not mean that a defendant is in custody for **Miranda** purposes. **Miranda** warnings are not required where the police conduct a general on-the-scene investigation as to the facts surrounding a crime or other general questioning.

A police officer stopped a truck in which defendant was a passenger because its license plate was obstructed from view by a trailer hitch. After checking for outstanding warrants, the officer verbally warned the driver about the violation, then asked to talk further. The driver assented, and the officer asked if there was anything illegal in the truck and was told there was not. The officer asked for and received the driver's consent to search the truck and each occupant's consent to search his person as each exited the truck. After the driver and occupants were searched, for their safety they were asked to stand with another officer at the front of the squad car as the truck was searched. The officer found a baggie of pills in the glove compartment during a search of the truck. He asked the occupants of the truck to whom the pills belonged, and defendant admitted the pills were Valium and were his.

The court concluded that although defendant was seized for Fourth Amendment purposes, he was not in custody for Fifth Amendment purposes when he responded to the officer's question. The police had only issued a verbal warning to the driver for a minor infraction. The defendant was not handcuffed, placed in a locked squad car, or told he was under arrest. He was not transported from the scene of the stop. Neither of the two officers on the scene displayed weapons or physically restrained the occupants of the truck by force. Defendant was not separated from his companions when the officer asked about the pills. The lights on the squad cars were flashing, but this was necessary to ensure the safety of the persons and vehicles at the side of the road at 2 a.m. The mood at the scene was serious, but not oppressive.

Because defendant was not in custody, **Miranda** warnings were not required before defendant responded to the officer's general question regarding the pills. The court reversed the trial court's decision granting defendant's motion to suppress his statement.

(Defendant was represented by former Assistant Defender Carrie Stevens, Ottawa.)

**People v. Jordan**, 2011 IL App (4th) 100629 (No. 4-10-0629, 11/14/11)

Statements obtained from the defendant during a custodial interrogation by the police are inadmissible unless preceded by defendant's waiver of his rights following **Miranda** warnings. Evidence seized as a result of information obtained during an unwarned interrogation is likewise inadmissible as the fruit of the poisonous tree.

"Custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. An interrogation is custodial if under the circumstances of the questioning a reasonable person innocent of any crime would have felt he was not at liberty to terminate the

interrogation and leave. Relevant factors are: (1) the time and place of the interrogation; (2) the number of police officers present; (3) the presence or absence of family or friends; (4) any indicia of a formal arrest procedure; and (5) the manner by which the individual arrived at the place of interrogation. Generally, due to the non-coercive aspects of ordinary traffic stops, a person temporarily detained during a traffic stop is not in custody, unless the person is thereafter subjected to treatment that renders him in custody for practical purposes.

The Appellate Court affirmed the trial court's finding that defendant's detention was custodial and no longer incident to an ordinary traffic stop when she confessed to possessing cannabis. The defendant was a passenger in a car stopped by the police. The police isolated her from the driver of the car in the rear seat of a squad car for 27 minutes before she confessed. This isolation allowed the police the advantage of playing her and the driver against each other. She was also locked in the squad car for 23 minutes and the police threatened to extend this detention indefinitely by indicating they intended to send for drug-detecting dogs. Defendant could have reasonably concluded that the police did not accept her initial insistence of innocence and that she would not be allowed to leave until she confessed to suspected wrongdoing.

Although the police told defendant she was not in any trouble, this assertion was contradicted by the police asking questions designed to elicit incriminating responses, locking defendant in the squad car, and conducting a full search of the car, including an anticipated dog sniff. The presence of twice as many police officers as detainees contributed to the police-dominated atmosphere and reinforced to defendant that she was targeted by the investigation. The Appellate Court also found it troubling that the police officer who interrogated defendant turned his microphone off and thus there was no audio portion of the eight minutes of the interrogation that resulted in the confession.

Because the police failed to give defendant **Miranda** warnings, the confession and cannabis seized by the police that was the fruit of that questioning were properly suppressed.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

**People v. McCarron**, 403 Ill.App.3d 383, 934 N.E.2d 76 (3d Dist. 2010)

1. The police need to provide **Miranda** warnings to a person they seek to question only if the person is in custody. The determination of whether an individual is in custody is an objective one, which requires a court to examine the totality of the circumstances and assess whether a reasonable person in that situation would have felt free to terminate the encounter with the police.

The court determined that defendant was not in custody and therefore the police did not need to **Mirandize** the defendant when they questioned her at the hospital. Defendant was a 37-year-old pathologist who was suffering from depression, but was lucid and coherent. Following a suicide attempt, she had been brought to the hospital by ambulance accompanied by her mother and a police officer. The officer asked her no questions. She was not arrested, restrained, or placed under police guard at the hospital. The first officer who spoke to her at the hospital left after defendant told him that she had admitted to her husband that she had killed her daughter, but indicated that was all she wanted to say. Two other officers who attempted to question defendant told her she was not under arrest and also left when defendant said she did not want to talk. Defendant told those officers that they could return the next day and defendant told a friend that she intended to confess to the police the next day. The following day, defendant's husband and a DCFS representative were present when defendant did make a statement to the police. The circumstances of that interview were not coercive. Therefore a reasonable person in defendant's position would have felt free to

terminate the encounter with the police.

2. A question-first, warn-later strategy occurs where the police elicit an incriminating response from an individual without providing **Miranda** warnings, then provide the **Miranda** warnings and again elicit an incriminating statement. When the police deliberately use this technique, any statement made following the **Miranda** warnings is inadmissible, absent curative measures.

The court concluded that a second statement made by defendant to the police one hour after the first statement, and preceded by **Miranda** warnings, was admissible because the police did not act deliberately to circumvent **Miranda**. The police did not act forcefully in obtaining a statement from defendant in the period of time between the offense and the first statement. The police intended to obtain only one statement from defendant. The second statement was taken only because the first statement was not recorded and the State's attorney requested a recorded statement.

**People v. Wright**, 2011 IL App (4th) 100047 (No. 4-10-0047, 9/16/11)

1. Under **Miranda v. Arizona**, statements made in response to interrogation are inadmissible unless the suspect was warned of his Fifth Amendment rights. A suspect is "in custody" for **Miranda** purposes where a reasonable person who is innocent of any crime would have felt at liberty to terminate the interrogation and leave. Among the factors determining whether a statement was "custodial" are the location, time, length, mode, and mood of the questioning; the number of police officers present; the presence or absence of the suspect's family and friends; any *indicia* of a formal arrest (such as the display of weapons or force, physical restraint, booking, or fingerprinting); the process by which the individual arrived at the place of questioning; and the age, intelligence, and mental makeup of the accused.

Although **Miranda** applies to a traffic stop in which the defendant is subjected to restraints comparable to those associated with a formal arrest, the mere fact that the defendant is detained during a traffic stop does not equate to custody for **Miranda** purposes.

2. The court concluded that a defendant suspected of DUI was not "in custody" where he was transported in the rear seat of a squad car, by an officer who had arrested him on previous occasions, to a nearby location where defendant had parked his SUV. The court found that defendant voluntarily entered the car, sat uncuffed with the rear windows open, and knew that he was being taken only a short distance. The court also stressed that defendant was not subjected to any restraints comparable to those associated with a formal arrest.

Because defendant was not in custody, his statements were admissible despite the absence of **Miranda** warnings.

3. The court noted that under Fourth District precedent, a trial court can conclude that the defendant was "in custody" only if it finds both that the defendant subjectively believed that he was in custody and that a reasonable innocent person in defendant's position would have believed that he was in custody. If the suspect testifies that he did not believe that he was in custody during the questioning, the trial court need not consider whether a reasonable person would have believed himself to be in custody. See **People v. Goyer**, 265 Ill.App.3d 160, 638 N.E.2d 390, 393 (4th Dist. 1994).

Although the defendant failed to testify that he believed he was in custody, the State failed to raise the **Goyer** issue before the trial court. Therefore, the Appellate Court declined to reach this issue.

4. The court rejected defendant's argument that the toxicology test results of blood and urine samples which defendant provided should have been excluded because the officer failed

to tell defendant that he could refuse to give the samples. A defendant who has been arrested for DUI has no constitutional right to refuse chemical testing. Furthermore, police inquiry into whether a suspect will submit to a blood alcohol test does not constitute "interrogation" within the meaning of **Miranda**.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

Top

**§10-3(d)**
**"Interrogation"**

**People v. Barnett**, 393 Ill.App.3d 556, 913 N.E.2d 1221 (3d Dist. 2009)

1. Statements obtained from a person as a result of "custodial interrogation" are admissible at trial only if **Miranda** warnings were given. "Interrogation" includes express police questioning and words or actions that are reasonably likely to elicit an incriminating response. The definition of "interrogation" focuses primarily on the perception of the defendant, not that of the officer.

2. Several statements made by the defendant were in response to custodial interrogation.[2] After defendant's arrest for DUI, the officer asked who owned the vehicle defendant had been driving, despite having already obtained that information though a computer check of the vehicle registration number. The officer testified that he needed to know the identity of the owner to complete the tow report, but admitted that he would have used the information from the computer check rather than relying on anything defendant said.

In addition, statements at the police station, in which defendant said that he was on medication and was not supposed to drink, were properly found by the trial court to have been the result of custodial interrogation. The officer testified that he could not recall most of the questions he asked during a 20-minute DUI observation period, and the court found it reasonable to infer that the officer questioned defendant concerning his medical condition. "Given defendant's admitted consumption of alcohol, any questions regarding his seizures and ingesting medication could have induced defendant to incriminate himself."

The trial court's suppression order was affirmed.

**People v. Chestnut**, 398 Ill.App.3d 1043, 921 N.E.2d 811 (4th Dist. 2010)

The Appellate Court affirmed the trial court's order granting defendant's motion to suppress evidence which the officers found during a search of the defendant. Defendant came to a house where a search warrant was being executed, and eventually consented to a search of his person.

1. Under **Michigan v. Summers**, 452 U.S. 692 (1981), a police officer has limited authority to detain occupants of premises that are being searched, in order to ensure that the occupants are unarmed and uninvolved in any criminal activity. It has been held that under **Summers**, the term "occupants" includes individuals who approach the premises while a

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[2]The record showed that defendant was in custody at the time of his statements and that **Miranda** warnings were never given.

search warrant is being executed. (See **U.S. v. Jennings**, 544 F.3d 815 (2008)).

However, "custodial interrogation" of persons seized under **Summers** is permitted only if there is an articulable basis for suspecting criminal activity. Because the police had no reasonable suspicion that defendant was engaged in criminal activity, **Summers** allowed them to ask only for defendant's identity and an explanation of his reasons for being on the property. They could not ask incriminating questions, including whether defendant was in possession of controlled substances.

2. The court concluded that the interrogation of the defendant was "custodial," because a reasonable person would not have believed that he was free to leave. The court stressed that police asked whether defendant was in possession of controlled substances, one of the officers testified that defendant was not free to leave, defendant was prevented from leaving because one officer was standing in front of him and another to his rear and in front of the door through which he would have to exit, and defendant was restricted to the porch of the house. Because there was no basis to suspect criminal activity, the custodial questioning was not justified under **Summers**.

3. The court also noted that because the police engaged in custodial interrogation, **Miranda** warnings were required. (See also **APPEAL**, §2-7(a) & **SEARCH & SEIZURE**, §§44-4(b), 44-8(b), 44-11(b)).

**People v. Hannah**, 2013 IL App (1st) 111660 (No. 1-11-1660, 6/3/13)

1. Under **Miranda**, a person who is subjected to custodial interrogation must be advised before the interrogation that he has the right to remain silent, that any statement he makes can be used as evidence against him, and that he has a right to an attorney and to the appointment of counsel if he is indigent. Generally, **Miranda** warnings are not required when police who are at the scene conduct general, investigatory questioning as to the facts surrounding a crime. The purpose of **Miranda** is to ensure that an inculpatory statement is the product of the suspect's free will and not the result of the compulsion inherent in custodial surroundings.

Whether a suspect is in custody for **Miranda** purposes depends on whether a reasonable person would have felt he was free to terminate the interrogation and leave. Among the factors to be considered are the location, time, length, mood and mode of questioning; the number of police officers present; the presence or absence of family and friends of the individual; any *indicia* of formal arrest such as the show of weapons or force, the use of physical restraints or subjecting the suspect to booking or fingerprinting; the manner by which the individual arrived at the place of questioning; and the age, intelligence, and mental makeup of the accused. No single factor is dispositive, and all factors must be considered.

2. Defendant was subjected to custodial interrogation where: (1) he was detained because he was on premises for which police were executing a search warrant, and (2) he was asked who owned a handgun that was found during the search. The court noted that the police forced their way into the residence to execute the search warrant, had their weapons drawn, searched and handcuffed the defendant and the other occupant, and physically moved defendant to a separate room where he was monitored by several police officers while the search was conducted. It was in the separate room that he was asked who owned the handgun found in a bedroom. The court concluded that no reasonable person would have felt free to refuse to answer the question or to terminate the encounter, and that defendant was not free to leave. Furthermore, the situation presented the inherent compulsion which is intended to be countered by the **Miranda** warning requirement. Under these circumstances, **Miranda** warnings were required before defendant was asked about ownership of the handgun.

The court rejected the State's argument that defendant was not "in custody" because he was merely detained while the search warrant was executed. Unlike this case, the precedent relied upon by the State involved defendants who were not handcuffed at the time of questioning.

The court also rejected the argument that under **People v. Colyar**, 2012 IL 111835, handcuffing a defendant for the safety of officers does not constitute "custody" under **Miranda**. In **Colyar**, the issue was whether the defendant was "seized" in violation of the Fourth Amendment where he was handcuffed and searched after a bullet was observed in plain view inside a vehicle. Here, the issue was whether, under the Fifth Amendment, a person who is detained while a search warrant is being executed is "in custody" for **Miranda** purposes.

The court also rejected the argument that the case fit within the "public safety" exception to **Miranda**. Due to overriding considerations of public safety, the public safety exception permits police to dispense with **Miranda** warnings before asking questions devoted solely to locating an abandoned weapon. **New York v. Quarles**, 467 U.S. 649 (1984). Here, defendant was interrogated after the firearm was recovered, when there was no safety risk to the officers. Furthermore, the question asked of defendant did not aid the police in recovering the weapon or executing a search warrant, and therefore was not general on the scene questioning concerning the facts of the crime. Instead, it was a question which was reasonably likely to elicit an incriminating response, and therefore constituted interrogation.

3. Because defendant's incriminatory statement was obtained in violation of **Miranda**, the trial court erred by denying the motion to suppress. However, the court concluded that the error was harmless where the defendant subsequently made a second incriminating statement regarding his ownership of the handgun after he was advised of his **Miranda** rights at the police station. Therefore, the conviction was affirmed.

**People v. Wright**, 2011 IL App (4th) 100047 (No. 4-10-0047, 9/16/11)

1. Under **Miranda v. Arizona**, statements made in response to interrogation are inadmissible unless the suspect was warned of his Fifth Amendment rights. A suspect is "in custody" for **Miranda** purposes where a reasonable person who is innocent of any crime would have felt at liberty to terminate the interrogation and leave. Among the factors determining whether a statement was "custodial" are the location, time, length, mode, and mood of the questioning; the number of police officers present; the presence or absence of the suspect's family and friends; any *indicia* of a formal arrest (such as the display of weapons or force, physical restraint, booking, or fingerprinting); the process by which the individual arrived at the place of questioning; and the age, intelligence, and mental makeup of the accused.

Although **Miranda** applies to a traffic stop in which the defendant is subjected to restraints comparable to those associated with a formal arrest, the mere fact that the defendant is detained during a traffic stop does not equate to custody for **Miranda** purposes.

2. The court concluded that a defendant suspected of DUI was not "in custody" where he was transported in the rear seat of a squad car, by an officer who had arrested him on previous occasions, to a nearby location where defendant had parked his SUV. The court found that defendant voluntarily entered the car, sat uncuffed with the rear windows open, and knew that he was being taken only a short distance. The court also stressed that defendant was not subjected to any restraints comparable to those associated with a formal arrest.

Because defendant was not in custody, his statements were admissible despite the absence of **Miranda** warnings.

3. The court noted that under Fourth District precedent, a trial court can conclude that the defendant was "in custody" only if it finds both that the defendant subjectively believed that he was in custody and that a reasonable innocent person in defendant's position would have believed that he was in custody. If the suspect testifies that he did not believe that he was in custody during the questioning, the trial court need not consider whether a reasonable person would have believed himself to be in custody. See **People v. Goyer**, 265 Ill.App.3d 160, 638 N.E.2d 390, 393 (4th Dist. 1994).

Although the defendant failed to testify that he believed he was in custody, the State failed to raise the **Goyer** issue before the trial court. Therefore, the Appellate Court declined to reach this issue.

4. The court rejected defendant's argument that the toxicology test results of blood and urine samples which defendant provided should have been excluded because the officer failed to tell defendant that he could refuse to give the samples. A defendant who has been arrested for DUI has no constitutional right to refuse chemical testing. Furthermore, police inquiry into whether a suspect will submit to a blood alcohol test does not constitute "interrogation" within the meaning of **Miranda**.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

Top

**§10-4**
**Waiver of Rights**

**§10-4(a)**
**Generally**

**Berghuis v. Thompkins**, ___ U.S. ___, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (No. 08-1470, 6/1/10)

1. Under **Miranda v. Arizona**, a suspect who is subjected to custodial interrogation has the right to remain silent and the right to the presence of counsel. An invocation of the right to counsel is sufficient to end the interrogation only if it is clear and unambiguous. (See **Davis v. U.S.**, 512 U.S. 452 (1994)). Although the court had never set standards for the specificity required to invoke the right to silence, it held in this case that there is no "principled reason" to adopt different standards for invoking the right to counsel and the right to silence.

The court added that requiring an unambiguous invocation of the right to silence results in an objective inquiry of the sufficiency of a request and relieves law enforcement agents of the difficult task of determining what the suspect meant by an unclear statement. Finally, suppression of statements made after ambiguous references to the right to silence would add only marginally to the protection of **Miranda**, but would place a significant burden on society's interest in prosecuting crimes.

Thus, a suspect does not invoke the right to silence by merely refusing to speak. When a suspect makes an incriminatory statement after an extended period of silence in response to police questioning, the relevant issue is whether the suspect waived his **Miranda** rights before making the statement.

Here, defendant did not exercise the right to silence by remaining silent during most of a three-hour interrogation (defendant occasionally responded "yes," "no," or "I don't know" to police questioning, but otherwise did not speak). Because the defendant did not exercise his right to silence, the officers were not required to end the interrogation.

2. Although defendant's refusal to speak during the interrogation did not invoke the right to silence, a statement which he eventually made in response to police questioning was admissible only if he waived his **Miranda** rights.[3] A waiver must be voluntary in the sense that it is the product of a free and deliberate choice and made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

A waiver need not be express, however, and may be inferred from the defendant's behavior. Thus, "a suspect who has received and understood the **Miranda** warnings, and has not invoked his **Miranda** rights, waives the right to remain silent by making an uncoerced statement to the police."

Here, there was no evidence that defendant failed to understand his rights, and no evidence that his statement was coerced. In addition, his answers to the officer's questions constituted a "course of conduct indicating waiver" of the right to silence; had defendant "wanted to remain silent, he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his **Miranda** rights and ended the interrogation."

The court also rejected the argument that police must obtain a **Miranda** waiver before they even begin custodial questioning.

Because defendant waived his right to silence by responding to the officer's questions, and there was no evidence that defendant failed to understand the **Miranda** warnings or that his statement was involuntary, his responses to the officer's questions were not inadmissible on the grounds they had been obtained in violation of **Miranda**. (See also **COUNSEL**, §13-4(b)(4)).

**In re J. M.**, 2014 IL App (5th) 120196 (No. 5–12–0196, 4/18/14)

1. Whether a **Miranda** waiver is knowing and intelligent is a factual question that is reviewed under the manifest weight of the evidence standard. A factual finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident or the finding is unreasonable, arbitrary, and not based on the evidence.

Before a confession can be admitted at trial, the State must prove by a preponderance of the evidence that the defendant validly waived both the privilege against self-incrimination and the right to counsel. A **Miranda** waiver is valid where it is knowing and intelligent in that it reflects an intentional relinquishment or abandonment of a known right or privilege. A valid waiver requires that the suspect is aware not only of the State's intention to use any statement to help secure a conviction, but also that he or she can refuse to talk and request a lawyer.

2. In determining whether a suspect knowingly and intelligently waived **Miranda** rights, the critical question is whether the officer's statements, in context and considering the subject's age, background, and intelligence, conveyed a clear and understandable warning of the suspect's rights. Although a mental deficiency does not necessarily render a waiver involuntary or unknowing, the defendant's mental capacity is a factor which must be considered.

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[3]After nearly three hours of interrogation, defendant answered "yes" to two questions by an officer; whether Defendant "prayed to God" and whether he prayed for forgiveness "for shooting that boy down."

Furthermore, courts must take care that a juvenile's incriminating statement is not the product of ignorance of one's rights or "adolescent fantasy, fright or despair." Furthermore, suspects who are mentally deficient are more susceptible to police coercion or pressure, are predisposed to try to please the questioner, and tend to be more submissive and less likely to understand their rights. Thus, when dealing with a mentally deficient juvenile, courts must exercise extreme care to ensure that any waiver of **Miranda** was knowing and intelligent.

3. The trial court abused its discretion by finding that the minor suspect's **Miranda** waiver was knowing and intelligent. The minor was 13 years old but had the mental capacity of a seven-year-old. His IQ was 54 - 56, which placed him in the mildly retarded range. The minor attended special education classes, had difficulty reading the first **Miranda** warning, and was unable to explain the meaning of the word "silent." After the minor had trouble reading the first warning, a police officer read the rest of the warnings and attempted to explain them. The officer also told the minor that his mother was outside and wanted him to tell the truth. However, the mother testified that she was never told by police that she could attend the interrogation of her son.

The minor had been found unfit to stand trial, and an expert testified that the minor did not knowingly and intelligently waive his **Miranda** rights. Finally, the court concluded that the DVD of the interrogation showed that the minor "put his trust in" the officers and did not understand that they would use any statements they obtained against him. Under these circumstances, the trial court erred by finding that the **Miranda** waiver was knowing and voluntary.

The order denying the motion to suppress was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

**People v. Daniels**, 391 Ill.App.3d 750, 908 N.E.2d 1104 (1st Dist. 2009)

1. Before a confession can be admitted at trial, the State must prove by a preponderance that the accused validly waived the right to counsel and the privilege against self-incrimination. A **Miranda** waiver is valid if it is knowing and intelligent.

"The crucial test to be used in determining whether an accused knowingly and intelligently waived her rights is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of her rights." Furthermore, the "greatest care" is to be used when evaluating waivers by youthful and mentally deficient defendants.

2. The trial court's finding that the defendant knowingly and intelligently waived her **Miranda** rights was contrary to the manifest weight of the evidence. Defendant had an IQ between 55 and 64, placing her in the lowest 1/10 of 1% of adults her age. She was functionally illiterate and could read only very simple, short sentences of two to three words. The defendant had trouble retaining information, was incapable of memorizing and recalling three items during a conversation, could not identify the president of the United States, and had trouble performing complicated counting, addition or subtraction. Defendant had attended special education classes throughout her life, and received social security disability checks based on her mental disability.

In addition, defendant had been found unfit to stand trial due to mental limitations and her inability to understand the roles of court personnel. Finally, she had been diagnosed as suffering from mental retardation and symptoms of psychosis.

Although one of the experts who examined the defendant disagreed with two other experts concerning the defendant's ability to understand **Miranda** warnings, all three experts

agreed that defendant was unable to function at an abstract level and that some degree of abstract reasoning is required to comprehend **Miranda** warnings. In addition, "record is replete with evidence of the shortcomings of the examination" by the expert who found that defendant was able to understand **Miranda** warnings.

In any event, it appeared that the trial court did not base its holding on its evaluation of the credibility of the experts, but instead "chose to formulate" an opinion based upon the judge's individual "conceptualization of what it would take to establish sufficient comprehension" of **Miranda** warnings. Because the trial court's conclusion was not supported by the evidence, the defendant's confession should have been suppressed.

The court also noted that the trial judge relied primarily on defendant's claim that she understood the **Miranda** warnings; the Illinois Supreme Court has made clear that when a defendant lacks the ability to understand **Miranda** warnings, her beliefs concerning her ability to comprehend those warnings is of little value. The court also noted expert testimony indicating that defendant would "parrot" what she had heard about **Miranda** even if she did not understand the concepts embodied in the warnings.

Because defendant's videotaped confession should not have been admitted in the absence of a valid **Miranda** waiver, and the error was not harmless where the confession was the primary evidence of guilt, the conviction was reversed and the cause remanded for a new trial.

**People v. Kronenberger**, 2014 IL App (1st) 110231 (No. 1-11-0231, 3/10/14)

When a defendant indicates "in any manner" during interrogation that he wants to remain silent, the interrogation must cease. But an invocation of the right to silence must be unambiguous, unequivocal, and clear. Defendant argued that he invoked his right to silence on two separate occasions during the police interrogation. The Appellate Court disagreed, finding that defendant never made an unambiguous and unequivocal invocation of his right to silence.

1. The record showed that during the interrogation, defendant (who was properly Mirandized) would at times answer the detectives' questions, at times say nothing, and at times lament his circumstances. At one point, the detectives asked defendant a series of questions about whether he wanted to keep talking. In response, defendant made some very slight movements of his head, but it was unclear whether he actually nodded or shook his head. The Appellate Court held that defendant's head gestures did not clearly indicate a desire to end all questioning, and hence were not an unambiguous and unequivocal invocation of the right to silence.

2. At a later point in the interrogation, the detectives were trying to get defendant to tell the truth about what happened, and defendant repeatedly denied any involvement in the offense. The detectives left the room, and when one of them reentered, he asked defendant, "Are you done talking to me? Are you done talking to all of us?" Defendant answered "Yeah.

The Court held that viewed within the context of the circumstances leading up to defendant's response, it was unclear whether defendant was indicating that he wished to remain silent or whether he had nothing else to tell the detectives. Defendant thus did not unambiguously invoke his right to silence.

3. Even if defendant had invoked his right to silence in the above exchanges, the later videotaped confession did not need to be suppressed. Shortly after the above exchanges, defendant clearly invoked his right to counsel and the detectives immediately ended the interrogation. Once a defendant invokes his right to counsel, further questioning must cease, unless defendant reinitiates interrogation.

Defendant was left alone in the interrogation room for 40 minutes and then taken out for processing. At that point, defendant voluntarily reinitiated the interrogation by saying that he wanted to talk to the detectives. The detectives gave him **Miranda** warnings and defendant reaffirmed that he wanted to speak to them.

Under these circumstances, even if defendant had invoked his right to silence during the first two exchanges, and the detectives failed to honor those requests, defendant later invoked his right to counsel and the detectives scrupulously honored that request. The subsequent videotaped confession was therefore admissible because it was made after defendant reinitiated the interrogation and after he had been readvised of his rights.

The trial court properly denied the motion to suppress.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

Top

**§10-4(b)**
**Interrogation After the Right to Counsel Attaches**

**People v. Campbell**, 2014 IL App (1st) 112926 (1-11-2926, 4/23/14)

Under **McNeil v. Wisconsin**, 501 U.S. 171 (1991) and **People v. Villalobos**, 193 Ill. 2d 229, 737 NE2d 639 (2000), an anticipatory exercise of the right to counsel does not invoke the **Miranda** right to counsel so as to prevent later custodial interrogation. Instead, **Miranda** is invoked only where at the time of the request, the suspect is both in custody and either subject to interrogation or under an imminent threat of interrogation.

Defendant testified that while he was restrained in his home as a search warrant was executed, he asked an officer whether he was under arrest. When he was told that he would be arrested, defendant stated that he wanted to talk to a lawyer. The court concluded that even if defendant's testimony was believed, a request for counsel under these circumstances did not effectively invoke **Miranda** because defendant had not been arrested and was not being subjected to questioning. In order to preclude a subsequent interrogation at the police station, therefore, defendant was required to repeat his request when police initiated an interrogation.

(Defendant was represented by Assistant Defender Rob Markfield, Chicago.)

**People v. Martin**, 408 Ill.App.3d 44, 945 N.E.2d 1239 (1st Dist. 2011)

1. Once formal charges have been filed, the State has an affirmative obligation to not act in a manner which circumvents the Sixth Amendment right to counsel. (**Maine v. Moulton**, 474 U.S. 159 (1985)). The State violates this obligation by knowingly circumventing the right to counsel during a confrontation between the defendant and a state agent.

The State violated **Moulton** when it asked the complainant to wear a wire when he visited defendant in the county jail. During the recorded conversation, defendant offered to pay the complainant $3,000 if he failed to come to come to court to testify. The Supreme Court noted that the complainant became a State agent when he agreed to wear the wire, and that **Moulton** precludes any use at trial of the conversation between the complainant and the defendant.

2. Had defense counsel objected to the conversation, the evidence would have been excluded. Due to the overwhelming admissible evidence of guilt, however, a different result would not have been likely had counsel acted competently. Thus, counsel was not constitutionally ineffective.

For the same reason, the "closely balanced evidence" prong of the plain error rule did not apply. Defendant's convictions for attempt murder and attempt armed robbery were affirmed.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

Top

**§10-4(c)**
**Interrogation After Request for Counsel**

**Maryland v. Shatzer**, ___ U.S. ___, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010) (No. 08-680, 2/24/10)

1. **Edwards v. Arizona**, 451 U.S. 477 (1981), provides that once an accused has invoked his right to counsel during custodial interrogation, a valid waiver of the right to counsel requires more than a mere showing that the accused subsequently responded to police-initiated custodial interrogation, even if the subsequent interrogation was preceded by new **Miranda** warnings. Under **Edwards**, a defendant who exercises his right to counsel during custodial interrogation may not be reinterrogated unless he initiates further communication, exchanges, or conversations with the police.

**Edwards** is not a constitutional requirement, but a prophylactic rule based on the belief that when a defendant requests the assistance of counsel for custodial interrogation, any subsequent interrogation without counsel poses a greater risk of coercion. As a judicially-crafted prophylactic rule, **Edwards** should be extended only to situations in which its benefits - preserving the integrity of the defendant's choice to communicate with police through counsel and preventing police from badgering an arrestee into waiving a previously asserted right to counsel – outweigh the cost of excluding what may be voluntary, reliable statements.

2. A break in custody which returns the suspect to his "normal life" makes it less likely that a subsequent decision to waive counsel is the result of coercion rather than the product of the suspect's free will. In addition, a defendant who was previously released after requesting counsel knows from experience that to end the interrogation, "he need only demand counsel." The court concluded that extending **Edwards** to preclude subsequent interrogation where the defendant has been released for a significant period of time would not significantly advance the interest of excluding forced confessions.

However, extension of **Edwards** would result in the suppression of many voluntary confessions. Furthermore, based on precedent, the application of **Edwards** following a break in custody would preclude police from interrogating defendants who have previously exercised their right to counsel even when the subsequent interrogation concerns unrelated crimes or questioning by a different law enforcement jurisdiction. The court concluded that the "only logical endpoint of **Edwards** disability is termination of **Miranda** custody and any of its lingering effects."

3. Because it would be impractical to decide on a case-by-case basis whether a break in custody is sufficient to end the coercive effort of reinterrogation, the court adopted a "bright-line" rule that a break in custody of 14 days or more is sufficient to allow the defendant to "shake off any residual coercive effect" of custody. In a footnote, however, the court stressed that even a defendant who has been released for more than 14 days may show that his **Miranda** waiver was involuntary. In such cases, the defendant is entitled to the protection of **Miranda** even if he cannot claim the *per se* protection of **Edwards**.

4. Where defendant was incarcerated in a state prison on an unrelated charge when he exercised his right to have counsel during interrogation concerning a new crime, his return to general population constituted a sufficient "break" in custody to trigger the 14-day rule. Thus, police could interrogate defendant when the investigation was reopened more than two years after the request for counsel. The court concluded that lawful incarceration on an unrelated offense does not create the type of "coercive pressure" associated with continued custody on an offense for which the defendant has requested counsel, and that upon his return to general population defendant "regain[ed] the degree of control [he] had over [his life] prior to the interrogation."

**Montejo v. Louisiana**, ___ U.S. ___, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (No. 07-1529, 5/26/09)

The Supreme Court overruled **Michigan v. Jackson**, 475 U.S. 625 (1986), which held that police may not interrogate a defendant once counsel has been appointed at a preliminary hearing, arraignment or similar proceeding. The court found that the **Jackson** rule was unnecessary to protect criminal defendants in light of **Miranda**, **Edwards v. Arizona**, 451 U.S. 477 (1981) (defendant who exercises right to counsel during custodial interrogation may not be reinterrogated unless he or she initiates the contact), and **Minnick v. Mississippi**, 498 U.S. 146 (1990) (once defendant requests counsel he may not be approached for interrogation in the absence of counsel even if he has consulted with counsel in the meantime).

Under **Miranda**, **Edwards**, and **Minnick**, a defendant may preclude interrogation by merely requesting counsel when first given **Miranda** warnings. Thus, the "badgering" which the **Jackson** rule was intended to prevent is precluded. The court concluded that in view of the protections otherwise available to criminal defendants, the **Jackson** prophylactic rule is superfluous and not worth the "substantial costs to the truth-seeking process" which it creates.

**People v. Hunt**, 2012 IL 111089 (No. 111089, 4/19/12)

1. **People v. McCauley**, 163 Ill. 2d 414, 645 N.E.2d 923 (1994), held that there is no knowing waiver of the right to counsel when police, prior to or during custodial interrogation, refuse an attorney access to a suspect if the suspect has not been informed that the attorney was present and sought to consult with him. This rule is based on the Illinois constitutional guarantees against self-incrimination and to due process. Ill. Const. 1970, art. I, §§2, 10.

**McCauley** superimposed a state-specific right onto the existing **Miranda** framework. The constitutional justification for the **Miranda** regime is police custodial interrogation. **McCauley** did not reject this foundation by taking the police out of the equation. Accordingly, like a suspect's **Miranda** rights, a suspect's **McCauley** right arises only during police custodial interrogation.

2. Defendant was not subjected to police custodial interrogation when he had a conversation with an undercover informant and fellow inmate. Therefore, both **Miranda** and **McCauley** are inapplicable.

3. The court expressly overruled **People v. Perkins**, 48 Ill. App. 3d 762, 618 N.E.2d 1275 (5th Dist. 1993), which held that where a suspect has asserted his fifth amendment right to counsel, he cannot be questioned by undercover agents on a separate, unrelated, and uncharged offense while in jail, without the presence of an attorney and an opportunity to waive counsel. As the United States Supreme Court held in **Illinois v. Perkins**, 496 U.S. 292 (1990), **Miranda** warnings were not required because the defendant was not subjected to police custodial interrogation. It follows that defendant had no fifth amendment right to counsel. It was irrelevant that he requested counsel when he was arrested for an unrelated

offense.

**People v. Harris**, 2012 IL App (1st) 100678 (No. 1-10-0678, 8/30/12)

1. An individual subjected to custodial interrogation is entitled to have retained or appointed counsel present during the questioning. If the accused requests counsel at any time during the interrogation, she cannot be subject to further questioning unless a lawyer has been made available or the suspect reinitiates conversation. **Edwards v. Arizona**, 451 U.S. 477 (1981).

Whether defendant actually invoked her right to counsel is an objective inquiry, which at a minimum requires some statement that can reasonably be construed as an expression of a desire for counsel. A reference to an attorney that is ambiguous or equivocal, according to a reasonable officer in the circumstances, does not require cessation of questioning.

2. Defendant asked if it was "possible" to "have a few days to get an attorney," to which the officer responded, "No." Defendant began to ask, "How long can I —" but was interrupted by the officer who momentarily left the holding cell. On his return, the officer asked whether defendant was requesting an attorney, because if she was they were "done talking." Defendant responded that she did not know how she could make a call because "all my [phone] numbers is at the county." Defendant then agreed to answer questions.

3. Defendant's query whether it was possible to have some time to get an attorney was an unequivocal invocation of her right to counsel. Any ambiguity in her statement was only with regard to how long it would take and the process of acquiring an attorney, not with regard to whether she wanted one. She answered further questions only at the officer's prompting. Therefore, the statements made by defendant after her invocation of her right to counsel, including her recorded statements, were inadmissible.

4. Any statement made as a result of custodial interrogation at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in a murder case unless it is electronically recorded. 725 ILCS 5/103-2.1(b). If the trial court finds by a preponderance of the evidence that this provision was violated, any statements made by the defendant during or following that non-recorded custodial interrogation are presumed inadmissible, even if those statements were obtained in compliance with §103-2.1(b). 725 ILCS 5/103-2.1(d). It is irrelevant that the police did not willfully violate §103-2.1(b). The presumptive inadmissibility of such statements can be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. 725 ILCS 5/103-2.1(f).

5. Under the statute, a custodial interrogation occurs when a reasonable person in the suspect's position would consider herself in custody and is presented with a question reasonably likely to elicit an incriminating response. 725 ILCS 5/103-2.1(a). The statute thus codifies the common-law definition of custodial interrogation developed by **Miranda v. Arizona**, 384 U.S. 436 (1966), and its progeny. Both **Miranda** and §103-2.1 serve a protective purpose, and therefore **Miranda** case law can serve as guidance in interpreting §103-2.1.

Factors relevant to the determination whether a defendant is in custody include: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the person; (4) any indicia of formal arrest procedures, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused. A court must determine whether a reasonable person, innocent of any crime, would have believed that she could terminate the encounter and was free to leave.

6. Factors (1), (3), and (5) demonstrate that defendant was unquestionably subject to custodial interrogation. The police picked her up from a friend's house after midnight, after searching for her for more than a week, and transported her in an unmarked squad car to the station. There she was placed alone in an interview room that was likely locked. At the station, defendant admitted she had given the police a false name because she had an outstanding warrant for her arrest on a probation violation. Once the police confirmed this, defendant was not free to leave.

The Appellate Court was not persuaded by the State's argument that defendant was in custody on the probation violation and not the murder. "[T]he only fair reading of the circumstances in the record is that the police held the defendant in continued custody on the probation violation and, at best, used this custody to mask their intention to question her solely about the murder." Defendant was subjected to five interviews over 24 hours that were conducted with a confrontational mood of questioning, and the police did not convey that defendant could decline to answer questions. "This was more than mere investigatory questioning; it was custodial interrogation of a murder suspect."

7. Because defendant made an incriminating statement as a result of custodial interrogation at the police station, her statement was presumptively inadmissible because it was not electronically recorded. This presumption was not overcome because the State presented no evidence related to the voluntariness of the unrecorded statement. That evidentiary gap was not filled by evidence of the subsequent videotaped statements. The Appellate Court directed that a determination be made whether defendant's unrecorded statement was voluntary and reliable prior to retrial.

Defendant's felony murder conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

**People v. Hunt**, 403 Ill.App.3d 802, 939 N.E.2d 1039 (1st Dist. 2010)

The due process clause of the Illinois Constitution requires that the police inform a suspect that his attorney is present in the police station and asking to see him. Where the police fail to communicate that information, defendant has not validly waived his right to counsel guaranteed by the Illinois constitutional right against self-incrimination. **People v. McCauley**, 163 Ill. 2d 414, 645 N.E.2d 923 (1994).

Defendant was in custody on an unrelated charge. The police transferred him from the county jail to the police station where they arranged a meeting between defendant and a police informant. Their conversations were monitored and recorded by the police with judicial authorization. Shortly after their conversations began, an attorney who represented defendant on his unrelated charge appeared at the station and asked to speak with the defendant. He was not allowed to speak with the defendant until 45 minutes after his arrival at the station, following which he and defendant informed the police that defendant was invoking his right to remain silent and to consult with counsel. A week later, defendant was brought back to the police station and two more conversations with the informant were monitored and recorded.

1. Relying on **People v. Perkins**, 248 Ill.App.3d 762, 618 N.E.2d 1275 (5th Dist. 1993), and 725 ILCS 5/103-2.1, the Appellate Court found that defendant was subject to custodial interrogation on both occasions as a matter of state law because he was involuntarily transported to the police station to be interrogated by an undercover police agent who asked questions likely to elicit an incriminating response.

2. Since there was custodial interrogation, the police had no power to prevent or delay communication of defendant and his lawyer during the first interrogation by the informant.

3. Because defendant invoked his right to counsel at the first interrogation, defendant had a right to consult with his counsel prior to the second interrogation, and was denied that right when there was no consultation.

4. The custodial interrogations were also conducted in violation of defendant's state constitutional right not to be held incommunicado and his state constitutional and statutory rights to counsel. Ill.Const. 1970, Art. I, §§2, 10; 725 ILCS 5/103-4.

The Appellate Court affirmed suppression of the last 45 minutes of the first interrogation and the entirety of the interrogations that were conducted a week later.

**People v. Kronenberger**, 2014 IL App (1st) 110231 (No. 1-11-0231, 3/10/14)

When a defendant indicates "in any manner" during interrogation that he wants to remain silent, the interrogation must cease. But an invocation of the right to silence must be unambiguous, unequivocal, and clear. Defendant argued that he invoked his right to silence on two separate occasions during the police interrogation. The Appellate Court disagreed, finding that defendant never made an unambiguous and unequivocal invocation of his right to silence.

1. The record showed that during the interrogation, defendant (who was properly Mirandized) would at times answer the detectives' questions, at times say nothing, and at times lament his circumstances. At one point, the detectives asked defendant a series of questions about whether he wanted to keep talking. In response, defendant made some very slight movements of his head, but it was unclear whether he actually nodded or shook his head. The Appellate Court held that defendant's head gestures did not clearly indicate a desire to end all questioning, and hence were not an unambiguous and unequivocal invocation of the right to silence.

2. At a later point in the interrogation, the detectives were trying to get defendant to tell the truth about what happened, and defendant repeatedly denied any involvement in the offense. The detectives left the room, and when one of them reentered, he asked defendant, "Are you done talking to me? Are you done talking to all of us?" Defendant answered "Yeah.

The Court held that viewed within the context of the circumstances leading up to defendant's response, it was unclear whether defendant was indicating that he wished to remain silent or whether he had nothing else to tell the detectives. Defendant thus did not unambiguously invoke his right to silence.

3. Even if defendant had invoked his right to silence in the above exchanges, the later videotaped confession did not need to be suppressed. Shortly after the above exchanges, defendant clearly invoked his right to counsel and the detectives immediately ended the interrogation. Once a defendant invokes his right to counsel, further questioning must cease, unless defendant reinitiates interrogation.

Defendant was left alone in the interrogation room for 40 minutes and then taken out for processing. At that point, defendant voluntarily reinitiated the interrogation by saying that he wanted to talk to the detectives. The detectives gave him **Miranda** warnings and defendant reaffirmed that he wanted to speak to them.

Under these circumstances, even if defendant had invoked his right to silence during the first two exchanges, and the detectives failed to honor those requests, defendant later invoked his right to counsel and the detectives scrupulously honored that request. The subsequent videotaped confession was therefore admissible because it was made after defendant reinitiated the interrogation and after he had been readvised of his rights.

The trial court properly denied the motion to suppress.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

**People v. Quevedo**, 403 Ill.App.3d 282, 932 N.E.2d 642 (2d Dist. 2010)

Under **Davis v. U.S.**, 512 U.S. 452 (1994), a defendant is entitled to the protections of **Miranda** and **Edwards v. Arizona** only if he makes an unambiguous request for counsel. An interrogation need not cease where the suspect makes an ambiguous or equivocal statement that a reasonable officer would not have interpreted as an invocation of the right to counsel.

Here, the defendant expressed some confusion when given **Miranda** warnings. Defendant said that he wanted to "wait until the attorney arrived," and asked whether "the attorney can come right now?" However, when told that an attorney was not available that night, that he had the right not to talk without an attorney, and that if he requested counsel the officers could not "talk about your side of the story," defendant agreed to speak without counsel. Defendant subsequently gave inculpatory statements.

The court found that under the circumstances, a reasonable police officer could have interpreted defendant's statements as inquiries about the availability of an attorney and not as an invocation of the right to counsel. Because defendant agreed to answer the officers' questions after being told that an attorney was not available that night, the court concluded that defendant decided not to ask for an attorney because none was available immediately.

Because defendant did not make an unambiguous request for counsel, the protections of **Miranda** and **Edwards** were not triggered. Therefore, defendant's statements were admissible.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

**People v. Schuning**, 399 Ill.App.3d 1073, 928 N.E.2d 128 (2d Dist. 2010)

1. To invoke the right to counsel and bar further questioning under **Edwards v. Arizona**, 451 U.S. 477 (1981), an in-custody defendant must make a statement that would be understood by a reasonable police officer as a request for an attorney. Furthermore, the request must be made while the defendant is in custody and under interrogation or the imminent threat of interrogation.

2. Defendant made a sufficient request for counsel where, while hospitalized in the ICU after undergoing surgery to treat self-inflicted stab wounds, he asked the officer guarding him if he could use the phone to call his attorney. Although the officer said, "Yes," the nurse said that phones were not allowed in the ICU.

A. Defendant's request was made during interrogation or when interrogation was imminent. First, defendant was being guarded by an officer and was unable to leave the ICU. Second, defendant had been interrogated a few hours earlier, and had been told that officers would return to interrogate him again. Finally, police did renew the interrogation the next morning.

The court rejected the argument that defendant was required to make the request for counsel after receiving **Miranda** warnings or while being questioned during the second interrogation. "Under these facts, we cannot agree that the potential for coercion did not continue throughout the first interview, throughout the break in questioning, and throughout the subsequent interviews."

B. The request was not ambiguous because defendant did not specifically state why he wanted counsel or that he wanted counsel to be present during any additional interrogation. The request was clear and unambiguous, and was "not tainted with hesitation or uncertainty." Having just conducted an interrogation, and knowing that further interrogation was imminent, a reasonable officer should have known that defendant wanted

counsel's assistance during interrogation. The court also noted that the officer did not exhibit confusion about the request and did not attempt to clarify defendant's intent.

(Defendant was represented by Assistant Defender Steve Clark, Supreme Court Unit.)

Top

**§10-4(d)**
**Interrogation After Request to Remain Silent**

**Berghuis v. Thompkins**, ___ U.S. ___, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (No. 08-1470, 6/1/10)

1. Under **Miranda v. Arizona**, a suspect who is subjected to custodial interrogation has the right to remain silent and the right to the presence of counsel. An invocation of the right to counsel is sufficient to end the interrogation only if it is clear and unambiguous. (See **Davis v. U.S.**, 512 U.S. 452 (1994)). Although the court had never set standards for the specificity required to invoke the right to silence, it held in this case that there is no "principled reason" to adopt different standards for invoking the right to counsel and the right to silence.

The court added that requiring an unambiguous invocation of the right to silence results in an objective inquiry of the sufficiency of a request and relieves law enforcement agents of the difficult task of determining what the suspect meant by an unclear statement. Finally, suppression of statements made after ambiguous references to the right to silence would add only marginally to the protection of **Miranda**, but would place a significant burden on society's interest in prosecuting crimes.

Thus, a suspect does not invoke the right to silence by merely refusing to speak. When a suspect makes an incriminatory statement after an extended period of silence in response to police questioning, the relevant issue is whether the suspect waived his **Miranda** rights before making the statement.

Here, defendant did not exercise the right to silence by remaining silent during most of a three-hour interrogation (defendant occasionally responded "yes," "no," or "I don't know" to police questioning, but otherwise did not speak). Because the defendant did not exercise his right to silence, the officers were not required to end the interrogation.

2. Although defendant's refusal to speak during the interrogation did not invoke the right to silence, a statement which he eventually made in response to police questioning was admissible only if he waived his **Miranda** rights.[4] A waiver must be voluntary in the sense that it is the product of a free and deliberate choice and made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

A waiver need not be express, however, and may be inferred from the defendant's behavior. Thus, "a suspect who has received and understood the **Miranda** warnings, and has not invoked his **Miranda** rights, waives the right to remain silent by making an uncoerced statement to the police."

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[4]After nearly three hours of interrogation, defendant answered "yes" to two questions by an officer; whether Defendant "prayed to God" and whether he prayed for forgiveness "for shooting that boy down."

Here, there was no evidence that defendant failed to understand his rights, and no evidence that his statement was coerced. In addition, his answers to the officer's questions constituted a "course of conduct indicating waiver" of the right to silence; had defendant "wanted to remain silent, he could have said nothing in response to [the officer's] questions, or he could have unambiguously invoked his **Miranda** rights and ended the interrogation."

The court also rejected the argument that police must obtain a **Miranda** waiver before they even begin custodial questioning.

Because defendant waived his right to silence by responding to the officer's questions, and there was no evidence that defendant failed to understand the **Miranda** warnings or that his statement was involuntary, his responses to the officer's questions were not inadmissible on the grounds they had been obtained in violation of **Miranda**. (See also **COUNSEL**, §13-4(b)(4)).

**Salinas v. Texas**, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 12-246, 6/17/13)

Defendant agreed to accompany police officers to the police station, and voluntarily answered questions about a murder without being placed in custody or receiving **Miranda** warnings. When the officer asked whether ballistics testing would show that shell casings found at the scene matched defendant's shotgun, defendant failed to answer. After a few moments of silence, the officer asked additional questions which defendant answered.

Defendant was eventually tried for murder. Over defense objection, the prosecutor argued that defendant's reaction to the officer's question during the interview was evidence of his guilt. The prosecutor argued that an "innocent person" in the same position would have denied committing the offense.

1. Defendant argued that the Fifth Amendment right against self-incrimination prohibited the prosecutor from eliciting and commenting about defendant's silence during police questioning. A plurality of three justices (Alito, Roberts, and Kennedy) rejected this argument, finding that to exercise the Fifth Amendment privilege one must expressly raise the privilege at the time of the questioning. In the plurality's view, the Fifth Amendment provides only a right against self-incrimination, not an "unqualified right to remain silent." Thus, whether a citizen has a constitutional right to refuse to answer questions "depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim." The plurality also noted that unless the Fifth Amendment privilege is expressly claimed the government is not placed on notice that it may argue either that the information which it seeks is not incriminating or that any incrimination may be cured through a grant of immunity.

The plurality acknowledged that there are two exceptions to the requirement that the privilege be expressly invoked: (1) a criminal defendant need not take the stand and assert the privilege at trial, and (2) the failure to expressly invoke the Fifth Amendment privilege is excused where governmental coercion makes any forfeiture of the privilege involuntary. Under the second exception, a suspect who is subjected to custodial interrogation does not voluntarily forego his Fifth Amendment privilege unless he fails to claim the privilege after being given **Miranda** warnings. Similarly, forfeiture of the Fifth Amendment privilege may not be voluntary where the suspect is threatened with withdrawal of a governmental benefit such as government employment, or if assertion of the privilege would in and of itself tend to be incriminatory. In other words, "a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit or deny or refuse to answer."

Here, the interview was voluntary and defendant was free to leave at any time. Under these circumstances, defendant was required to expressly claim the Fifth Amendment

privilege unless he was deprived of the ability to voluntarily do so. The court found that defendant was not limited in claiming the privilege, as it would have been a "simple matter" to state that he was not answering the questions on Fifth Amendment grounds. His failure to do so meant that the Fifth Amendment did not preclude the prosecutor's use of and comment on his silence.

The plurality declined to adopt a third exception – that the Fifth Amendment privilege need not be explicitly invoked in situations where the interrogating official has reason to suspect that the answer he seeks will be incriminating. The plurality found that such an exception would unduly "burden the Government's interests in obtaining information and prosecuting criminal activity," and would be difficult to reconcile with **Berghuis v. Thompkins**, 560 U.S. 370 (2010), which held that during an custodial interrogation which was conducted after **Miranda** warnings had been given, the defendant failed to invoke the Fifth Amendment privilege by refusing to respond to police questioning for nearly three hours.

2. In a concurring opinion, Justices Thomas and Scalia declined to decide whether the defendant invoked the Fifth Amendment privilege, and found that even if the privilege had been invoked a prosecutor does not violate the Fifth Amendment by commenting on silence during a noncustodial interview. The concurring justices believed that **Griffin v. California**, 380 U.S. 609 (1965), which held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify, "lacks foundation in the Constitution" and therefore should not be extended to prohibit comment on noncustodial silence.

3. In a dissenting opinion, Justices Breyer, Ginsburg, Sotomayor, and Kagan found that Supreme Court precedent prohibits a prosecutor from penalizing an individual for exercising his Fifth Amendment privilege. The dissenters argued that there is no ritualistic formula for exercising the Fifth Amendment, and that commenting on a citizen's silence in response to questioning is improper whether or not the Fifth Amendment privilege is specifically cited, unless the circumstances clearly suggest that the silence was not based on an exercise of the Fifth Amendment privilege.

Because defendant had been made aware that he was a suspect even though he was not placed in custody, was not represented by counsel, and was asked a question which made it clear that police were attempting to determine whether he was guilty, it was reasonable to infer that his silence was an exercise of his Fifth Amendment right. Furthermore, under these circumstances there was no particular reason that police needed to know whether the defendant was relying on the Fifth Amendment as opposed to remaining silent for some other reason. Thus, the dissenters would have held that the prosecutor erred by commenting at trial on the defendant's silence during the noncustodial interrogation.

**People v. Flores**, 2014 IL App (1st) 121786 (No. 1-12-1786, 11/14/14)

1. To protect a defendant's constitutional right to silence, interrogation must cease once the defendant indicates in any manner and at any time prior to or during custodial interrogation that he wishes to remain silent. Once a defendant has asked to remain silent, his post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of his initial request.

2. Here the police failed to honor defendant's invocation of his right to remain silent. After giving defendant his **Miranda** rights, the police told defendant that a co-defendant had made statements inculpating defendant and asked if he wanted to talk about that. Defendant responded, "Not really. No." The police did not cease interrogation at that point, but instead continued to describe co-defendant's incriminating statements and to question defendant. Defendant again voiced his desire to remain silent, eventually saying that he was not "gonna

say nothing about nothing."

The questioning continued off and on for the next hour or so, until defendant eventually confessed. A few hours later, an assistant State's attorney interrogated defendant and obtained a videotaped confession.

3. Defendant's initial answer ("Not really. No.") was a clear and unequivocal statement that he did not want to waive his right to remain silent. It was not, as the State argued, limited to his desire to comment on his co-defendant's statements. Defendant thus unambiguously invoked his right to silence.

4. Any statements made after a defendant invokes his right to silence are admissible only if the authorities scrupulously honored his right to cut off questioning. To decide whether the authorities properly honored that right, courts ask whether: (1) they immediately halted the initial interrogation; (2) significant time elapsed between the interrogations; (3) they gave defendant new **Miranda** warnings; and (4) the second interrogation addressed a different crime.

5. Defendant's initial confession to the police should have been suppressed because they did not scrupulously honor his right to silence. The police did not immediately halt questioning, but instead continued to discuss his co-defendant's statements and ask defendant for his side of the story. No time elapsed between defendant's invocation and the continued questioning. The police did not give defendant new **Miranda** warnings. And they continued to question him about the same crime.

6. Defendant's statements to the ASA were also inadmissible and should have been suppressed. The ASA arrived and interrogated defendant approximately four hours after his initial confession and gave defendant new **Miranda** warnings. The second and third parts of the test were thus satisfied. But the first and fourth parts of the test were not. The police did not immediately cease interrogation after defendant invoked his right to silence and the ASA questioned defendant about the same crime. The authorities thus did not scrupulously honor defendant's invocation of his right to silence.

The Appellate Court suppressed defendant's confessions, reversed his convictions, and remanded his case for a new trial.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

**People v. Rubio**, 392 Ill.App.3d 914, 911 N.E.2d 1216 (2d Dist. 2009)

1. Noting that the Illinois Supreme Court has found that the "manifest weight of the evidence" standard of review, in which reviewing courts defer to the trial court, is based solely on the trial court's superior position from which to assess credibility, the Appellate Court concluded that the *de novo* standard of review applies where a trial court finding is based solely on documentary evidence rather than live testimony. Because the trial court's factual rulings appeared to have been based solely on the contents of a video recording of defendant's interrogation, and all defense arguments on appeal concerned matters portrayed in the video, the cause was reviewed *de novo*.

However, applying the *de novo* standard, the Appellate Court affirmed the trial court's ruling that defendant made a knowing waiver of his **Miranda** rights.

2. The court rejected defendant's argument that he invoked his right to silence during the interrogation because in three instances, he responded to police questioning by stating, "I can't talk." Although in isolation such statements might have conveyed the impression that defendant wanted to invoke his right to silence, in the context of the statements, as well as the

defendant's mannerisms, the statements conveyed that defendant was hesitant to confess but willing to continue speaking with police.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

Top

**§10-5**
**Voluntariness**

**§10-5(a)**
**Generally**

**People v. Murdock**, 2012 IL 112362 (No. 112362, 11/1/12)

After he was convicted of murder, defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to file a motion to suppress statements. After conducting a third stage evidentiary hearing, the trial court denied the petition. The Appellate Court reversed the trial court's order and remanded the cause for a suppression hearing.

On remand, the post-conviction court refused to suppress defendant's statement. The Appellate Court affirmed, and the defendant appealed.

The only witnesses at the suppression hearing were the chief interrogating officer and the defendant. At the third stage evidentiary hearing some three years earlier, the defendant's grandmother testified that she went to the police station while the defendant was being interrogated, but was not allowed to speak to the minor despite her request to do so.

1. The Supreme Court did not reach the issue of ineffective assistance, but found that the post-conviction court did not err by denying the motion to suppress. Whether a confession is voluntary depends on the totality of the circumstances, including such factors as the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of the questioning, the duration and legality of the detention, and whether there were threats, promises, or physical or mental abuse by the police. No single factor is dispositive. Instead, voluntariness depends on whether the defendant made the statement freely and voluntarily without compulsion or inducement, or whether his will was overborne at the time of the statement.

The taking of a juvenile's confession is especially sensitive, requiring that the greatest care be taken to assure that the confession was not coerced or suggested. An important consideration for juvenile confessions is whether a concerned adult was present during the interrogation. 705 ILCS 405/5-405(2) codifies the "concerned adult" factor by requiring that a law enforcement officer who makes a warrantless arrest of a minor must make a reasonable attempt to notify a parent or other legally responsible person and must take the minor to the nearest juvenile police officer. The "concerned adult" factor is particularly important where the juvenile has trouble understanding the interrogation process or asks to speak with the concerned adult, or where the concerned adult is prevented by police from speaking with the minor.

Whether the juvenile was allowed to confer with a concerned adult, and whether police interfered with such consultation, are important factors concerning voluntariness. However, a confession is not involuntary merely because a minor was denied an opportunity to confer with a concerned adult.

2. The court concluded that the issue before it was whether the post-conviction court properly denied the motion to suppress that was held after the Appellate Court's remand, and that it would only consider the evidence presented at the suppression hearing which the Appellate Court ordered. Thus, the court declined to consider the grandmother's testimony at the post-conviction hearing that her request to speak with the defendant during the interrogation was refused.

3. The court concluded that the lower court did not err by denying the motion to suppress. The court noted that the officer made no promises to the defendant, the defendant appeared to be in good condition and of normal intelligence and capacity for a 16-year-old, and there was no evidence of physical or mental abuse. Furthermore, although defendant was detained for some seven hours, he was only interrogated for about three hours and 15 minutes.

The court rejected defendant's argument that the statement was involuntary because defendant did not have an opportunity to confer with a concerned adult. Defendant argued that he should have been allowed to confer with his grandfather, who according to police officer came to the station, and that a juvenile officer should have been present during the interrogation.

The court concluded that the statement was not rendered involuntary by the failure of officers to allow defendant's grandfather to speak with defendant. It was unclear from the record why the grandfather was at the station, and the officer who spoke to the grandfather testified that neither defendant nor the grandfather asked to see the other. The court acknowledged that the officer should have informed the grandfather that he could speak with defendant if he desired, but in the absence of a request to do so "this is not a situation where a police officer affirmatively refused to let a concerned adult see a juvenile defendant."

Nor was the statement involuntary because the interrogation was conducted in the absence of a youth officer. Under Illinois law, two lines of cases have developed concerning the role of a juvenile officer. The first line holds that a juvenile officer's role is to ensure that a juvenile's parents have been notified of the arrest and that the juvenile has been given **Miranda** rights, fed, given access to restroom facilities, and not coerced. The second line of cases holds that a juvenile officer must take a more active role on behalf of the minor's interests and affirmatively protect the minor's rights. The court concluded that it need not resolve the conflict between the two lines of authority because the officer in question, although trained as a juvenile officer, was acting as the chief investigator and not as a juvenile officer. The court stressed that an officer cannot act as both an investigator and juvenile officer in the same case.

However, the court concluded that the juvenile officer's absence was mitigated because defendant received **Miranda** warnings and was properly treated, offered food, given access to the restroom, and not subjected to physical or mental abuse. Thus, the statement was voluntary despite the absence of a juvenile officer.

4. In dissent, Justices Burke, Theis and Freeman criticized the court for misconstruing the issue as a Fifth Amendment argument rather than the claim that was raised in the post-conviction petition – whether trial counsel was ineffective for failing to file a motion to suppress. The dissenters also found that the Appellate Court erred by remanding the cause for a suppression hearing rather than ruling on the propriety of the trial court's order denying post-conviction relief. Finally, the dissenters criticized the majority for ignoring the evidence presented at the third stage post-conviction hearing, which showed the circumstances surrounding the defense counsel's failure to file a motion to suppress and that such failure constituted ineffective assistance of counsel.

The dissenters also found that defense counsel was ineffective for failing to file a motion

to suppress the statements. The parties agreed that defense counsel's failure to seek to suppress the statement was objectively unreasonable, and the dissenters found that the outcome of the trial would likely have been different had the statement been suppressed because it was the only evidence that the minor had prior knowledge of his companions' intent to commit the offense.

The dissenters also found that the statement was involuntary where the grandmother was denied her request to speak to the defendant before or during the interrogation, no juvenile officer was present in the room with the defendant, defendant had no criminal history or experience with the criminal justice system, defendant was detained for several hours, and the videotape on which the court relied to find that the defendant did not appear to be under duress was made several hours after the statement in question.

The dissenters also stressed that the majority's opinion should not be taken as tacit approval for the Appellate Court's erroneous approach of ordering an unnecessary and improper remand for a suppression hearing instead of reviewing the trial court's order denying post-conviction relief on the ineffective assistance issue.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

**People v. Richardson**, 234 Ill.2d 233, 917 N.E.2d 501 (2009)

1. When a defendant challenges the admissibility of an inculpatory statement on voluntariness grounds, the State bears the burden of proving voluntariness by a preponderance of the evidence. Where the suspect was injured while in police custody, however, the State must show by clear and convincing evidence that the injuries were not inflicted as a means of inducing the statement. To carry this burden, more than a mere denial of police coercion is required.

2. Where defendant challenged the voluntariness of his inculpatory statements and it was undisputed that he suffered a black eye while in police custody, the State was required to prove by clear and convincing evidence that the eye injury was not inflicted to induce the statement. The State satisfied this burden where the officers who obtained defendant's statement did not merely deny that they had mistreated him or claim that they did not know how the injury had been inflicted, but related defendant's statements that the lockup keeper had assaulted him, that he had been treated fine at the station where the interrogation occurred, and that his statement had nothing to do with his eye injury.

In addition, the inculpatory statements were made several hours after the injury was suffered, defendant did not make an inculpatory statement at the first interrogation after the injury, the videotape of the final statement showed that defendant and his mother appeared "cool, calm, and collected" throughout his videotaped statement, and defendant testified at trial that his inculpatory statement was voluntary. Under these circumstances, the trial court acted properly by denying the motion to suppress.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

**People v. Wrice**, 2012 IL 111860 (No. 111860, 2/2/12)

1. Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987), use of a coerced confession as substantive evidence of guilt cannot be harmless error. Here, the court noted that **Wilson** was based on United States Supreme Court precedent, and that in **Arizona v. Fulminante**, 499 U.S. 279 (1991), a plurality of the court concluded that admission of a coerced confession was subject to the harmless error rule.

In view of the factual situation and divided opinion in **Fulminante**, the court declined to abandon **Wilson** entirely. Instead, the court modified the rule to hold that use of a

***physically*** coerced confession as substantive evidence of guilt cannot be harmless error. The court found that, as reflected by Justice White's concurring opinion in **Fulminante**, use of a physically coerced confession is inconsistent with the thesis that the American justice system is accusatory rather than inquisitorial. The court also noted that it was not required to decide whether the **Wilson** rule could stand as a matter of State constitutional law, because defendant claimed only that his rights had been violated under the federal constitution.

2. The court rejected the State's argument that in **People v. Mahaffey**, 194 Ill.2d 154, 794 N.E.2d 251 (2000), it held that use of a coerced confession is subject to the harmless error rule. First, whether harmless error review applied was not before the court in **Mahaffey**. Second, **Mahaffey** is overruled to the extent that it can be read as implicitly adopting harmless error review for the admission of coerced confessions.

3. The court rejected the State's argument that defendant was barred from arguing that his confession should have been suppressed as the product of police violence where he has consistently maintained that he did not confess. Under Illinois law, a defendant may argue, as an alternative, that his confession should be suppressed, even if he also asserts that he did not confess at all. Evidence of coercion is not rendered irrelevant merely because the defendant denies confessing.

Because defendant alleged that newly discovered evidence showed that his confession was the product of police torture, and the State conceded that defendant had shown "cause" for failing to raise the issue in prior post-conviction proceedings, the trial court's order denying leave to file a subsequent post-conviction petition was reversed and the cause remanded for the appointment of post-conviction counsel and second stage proceedings.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

**People v. Hughes**, 2013 IL App (1st) 110237 (No. 1-11-0237, 12/18/13)

Defendant was arrested and questioned concerning two murders, and gave several statements. The Appellate Court found that the confession to one of the murders was involuntary.

1. In reviewing a trial court's ruling on the voluntariness of a confession, the trial court's factual findings will be reversed only if those findings are against the manifest weight of the evidence. Ultimately, the trial court's ruling on whether the confession was voluntary is subject to *de novo* review.

The totality of circumstances determines voluntariness. The inquiry examines whether a defendant's will was overborne by the circumstances surrounding the confession. Factors considered include: (1) the defendant's age, intelligence, education, experience, and physical condition at the time of the detention and interrogation; (2) the duration of the interrogation; (3) the presence of **Miranda** warnings; (4) the presence of any physical or mental abuse; and (5) the legality and duration of the detention. A court may also consider an interrogator's fraud, deceit or trickery, and threats and promises made to a defendant. The State bears the burden of establishing voluntariness by a preponderance of the evidence.

2. Defendant was only 19 years old, had attended school through the ninth grade, and received grades of C's and D's. His juvenile arrests involved UUW and criminal trespass to a vehicle. The record did not show that he had any experience with the criminal justice system that was analogous to the circumstances here - being arrested and questioned about two murders. His youth, lack of education, and inexperience with the criminal justice system increased his susceptibility to police coercion. The court rejected the argument that defendant's ability to pronounce words of multiple syllables indicated that he was an intelligent person and had the ability to withstand police coercion.

The coercive atmosphere began when defendant was taken into custody and remained in the back seat of a car handcuffed in an uncomfortable and painful position for at least 90 minutes. He was picked up at 2:00 p.m. and the interrogation did not end until 6:00 a.m. the following day. Over the course of the interrogation, defendant's clarity and cadence of speech, alertness, and concentration deteriorated.

The coercive atmosphere was intensified when, after telling an exhausted defendant to sleep, the detective returned 25 minutes later and told defendant that he was taking him to a polygraph. The police fed defendant only a sandwich and three soft drinks during the entire 14-hour period, a meager amount of food for a large person such as defendant.

The videotape of defendant's detention also shows that defendant smoked marijuana immediately before the polygraph examination. The court concluded that marijuana use militates against a finding of voluntariness as it reduced defendant's ability to resist coercion Although defendant's use of marijuana was not noted by either party, the involuntariness of the confession was raised in the trial court and the opening brief on appeal, the Appellate Court's *de novo* review of the record included viewing the entire video, and justice sometimes requires that a court raise *sua sponte* an unargued and unbriefed reason to reverse.

Defendant was also told a number of untruths during the interrogation. While interrogators may use subterfuge in limited circumstances to elicit a confession, suppression is appropriate where the State extracts a confession using deceptive interrogation tactics calculated to overcome defendant's free will. Defendant was told several falsehoods, including that his fingerprints were found on the scene, that numerous witnesses placed him on the scene, and that one of the decedents had died of leg wounds. The falsehoods weighed more heavily against a finding of voluntariness they occurred in proximity to defendant being told that he had failed the polygraph after having been told in the pretest interview that the polygraph was infallible and that the polygraph examiner was there to help him by informing the court that he was sorry for what he had done if he showed remorse.

Because the totality of circumstances indicate that defendant's confession to one of the murders was involuntary, the convictions for two counts of murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

**People v. Patterson**, 2012 IL App (1st) 101573 (No. 1-10-1573, modified op. 9/26/12)

1. In determining whether a confession is voluntary, courts consider such factors as: (1) the defendant's individual characteristics including age, intelligence, education, physical condition, and experience with the criminal justice system, and (2) the nature of the interrogation including the legality and duration of the detention, the duration of the questioning, and any physical or mental abuse by police. Where a juvenile's confession is involved, additional factors to be considered include the time of day when the questioning occurred and whether a parent or other adult concerned with the juvenile's welfare was present. The voluntariness of a confession is determined by the totality of the circumstances; no single factor is dispositive.

2. The State failed to show that the 15-year-old suspect's confession was voluntary. The minor, who was questioned late in the evening, had at best limited experience with the police under circumstances in which he would not have learned about the need to protect his rights.

Furthermore, the detective who purported to act as a youth officer helped gather evidence against the minor, made no effort to contact the defendant's parents, and made only a token effort to contact the residential facility at which the minor was staying. The role of a youth officer is to act as a concerned adult interested in the juvenile's welfare, and not to be

adversarial or antagonistic toward the juvenile. "Youth officers cannot act in their role as a concerned adult while at the same time actively compiling evidence against [the] juvenile." (Quoting **People v. Griffin**, 327 Ill. App. 3d 538, 763 N.E.2d 880 (1st Dist. 2002)). The court stressed that by failing to contact the minor's parents and making only token efforts to contact the minor's residential facility, the officer effectively prevented any concerned adult from learning of the interrogation and coming to the minor's aid.

Because the State failed to show that the confession was voluntary, the trial court erred by denying the motion to suppress. Defendant's conviction for aggravated criminal sexual assault was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

**People v. Valle**, 405 Ill.App.3d 46, 939 N.E.2d 10, 2010 WL 4230364 (2d Dist. 2010)

If live testimony plays a role in the trial court's resolution of disputed issues of fact, review of the trial court's judgment is not *de novo*.

At the hearing on defendant's motion to suppress his statements, the trial court heard live testimony related to a disputed issue of fact, i.e., defendant's susceptibility to aggressive or deception interrogation techniques. A full video record existed of defendant's interrogation sessions. Because the videos did not resolve all disputed issues of fact, deference had to be given to the trial court's factual findings on the issue of the voluntariness of defendant's statements.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

Top

**§10-5(b)**
**Examples: Voluntary Statements**

**People v. Murdock**, 2012 IL 112362 (No. 112362, 11/1/12)

After he was convicted of murder, defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to file a motion to suppress statements. After conducting a third stage evidentiary hearing, the trial court denied the petition. The Appellate Court reversed the trial court's order and remanded the cause for a suppression hearing.

On remand, the post-conviction court refused to suppress defendant's statement. The Appellate Court affirmed, and the defendant appealed.

The only witnesses at the suppression hearing were the chief interrogating officer and the defendant. At the third stage evidentiary hearing some three years earlier, the defendant's grandmother testified that she went to the police station while the defendant was being interrogated, but was not allowed to speak to the minor despite her request to do so.

1. The Supreme Court did not reach the issue of ineffective assistance, but found that the post-conviction court did not err by denying the motion to suppress. Whether a confession is voluntary depends on the totality of the circumstances, including such factors as the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of the questioning, the duration and legality of the detention, and whether there were threats, promises, or physical or mental abuse by the police. No single factor is dispositive. Instead, voluntariness depends on whether the defendant made the statement freely and voluntarily without compulsion or inducement, or whether his will was overborne at the time of the statement.

The taking of a juvenile's confession is especially sensitive, requiring that the greatest care be taken to assure that the confession was not coerced or suggested. An important consideration for juvenile confessions is whether a concerned adult was present during the interrogation. 705 ILCS 405/5-405(2) codifies the "concerned adult" factor by requiring that a law enforcement officer who makes a warrantless arrest of a minor must make a reasonable attempt to notify a parent or other legally responsible person and must take the minor to the nearest juvenile police officer. The "concerned adult" factor is particularly important where the juvenile has trouble understanding the interrogation process or asks to speak with the concerned adult, or where the concerned adult is prevented by police from speaking with the minor.

Whether the juvenile was allowed to confer with a concerned adult, and whether police interfered with such consultation, are important factors concerning voluntariness. However, a confession is not involuntary merely because a minor was denied an opportunity to confer with a concerned adult.

2. The court concluded that the issue before it was whether the post-conviction court properly denied the motion to suppress that was held after the Appellate Court's remand, and that it would only consider the evidence presented at the suppression hearing which the Appellate Court ordered. Thus, the court declined to consider the grandmother's testimony at the post-conviction hearing that her request to speak with the defendant during the interrogation was refused.

3. The court concluded that the lower court did not err by denying the motion to suppress. The court noted that the officer made no promises to the defendant, the defendant appeared to be in good condition and of normal intelligence and capacity for a 16-year-old, and there was no evidence of physical or mental abuse. Furthermore, although defendant was detained for some seven hours, he was only interrogated for about three hours and 15 minutes.

The court rejected defendant's argument that the statement was involuntary because defendant did not have an opportunity to confer with a concerned adult. Defendant argued that he should have been allowed to confer with his grandfather, who according to police officer came to the station, and that a juvenile officer should have been present during the interrogation.

The court concluded that the statement was not rendered involuntary by the failure of officers to allow defendant's grandfather to speak with defendant. It was unclear from the record why the grandfather was at the station, and the officer who spoke to the grandfather testified that neither defendant nor the grandfather asked to see the other. The court acknowledged that the officer should have informed the grandfather that he could speak with defendant if he desired, but in the absence of a request to do so "this is not a situation where a police officer affirmatively refused to let a concerned adult see a juvenile defendant."

Nor was the statement involuntary because the interrogation was conducted in the absence of a youth officer. Under Illinois law, two lines of cases have developed concerning the role of a juvenile officer. The first line holds that a juvenile officer's role is to ensure that a juvenile's parents have been notified of the arrest and that the juvenile has been given **Miranda** rights, fed, given access to restroom facilities, and not coerced. The second line of cases holds that a juvenile officer must take a more active role on behalf of the minor's interests and affirmatively protect the minor's rights. The court concluded that it need not resolve the conflict between the two lines of authority because the officer in question, although trained as a juvenile officer, was acting as the chief investigator and not as a juvenile officer. The court stressed that an officer cannot act as both an investigator and juvenile officer in the same case.

However, the court concluded that the juvenile officer's absence was mitigated because defendant received **Miranda** warnings and was properly treated, offered food, given access to the restroom, and not subjected to physical or mental abuse. Thus, the statement was voluntary despite the absence of a juvenile officer.

4. In dissent, Justices Burke, Theis and Freeman criticized the court for misconstruing the issue as a Fifth Amendment argument rather than the claim that was raised in the post-conviction petition – whether trial counsel was ineffective for failing to file a motion to suppress. The dissenters also found that the Appellate Court erred by remanding the cause for a suppression hearing rather than ruling on the propriety of the trial court's order denying post-conviction relief. Finally, the dissenters criticized the majority for ignoring the evidence presented at the third stage post-conviction hearing, which showed the circumstances surrounding the defense counsel's failure to file a motion to suppress and that such failure constituted ineffective assistance of counsel.

The dissenters also found that defense counsel was ineffective for failing to file a motion to suppress the statements. The parties agreed that defense counsel's failure to seek to suppress the statement was objectively unreasonable, and the dissenters found that the outcome of the trial would likely have been different had the statement been suppressed because it was the only evidence that the minor had prior knowledge of his companions' intent to commit the offense.

The dissenters also found that the statement was involuntary where the grandmother was denied her request to speak to the defendant before or during the interrogation, no juvenile officer was present in the room with the defendant, defendant had no criminal history or experience with the criminal justice system, defendant was detained for several hours, and the videotape on which the court relied to find that the defendant did not appear to be under duress was made several hours after the statement in question.

The dissenters also stressed that the majority's opinion should not be taken as tacit approval for the Appellate Court's erroneous approach of ordering an unnecessary and improper remand for a suppression hearing instead of reviewing the trial court's order denying post-conviction relief on the ineffective assistance issue.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

**People v. Richardson**, 234 Ill.2d 233, 917 N.E.2d 501 (2009)

1. When a defendant challenges the admissibility of an inculpatory statement on voluntariness grounds, the State bears the burden of proving voluntariness by a preponderance of the evidence. Where the suspect was injured while in police custody, however, the State must show by clear and convincing evidence that the injuries were not inflicted as a means of inducing the statement. To carry this burden, more than a mere denial of police coercion is required.

2. Where defendant challenged the voluntariness of his inculpatory statements and it was undisputed that he suffered a black eye while in police custody, the State was required to prove by clear and convincing evidence that the eye injury was not inflicted to induce the statement. The State satisfied this burden where the officers who obtained defendant's statement did not merely deny that they had mistreated him or claim that they did not know how the injury had been inflicted, but related defendant's statements that the lockup keeper had assaulted him, that he had been treated fine at the station where the interrogation occurred, and that his statement had nothing to do with his eye injury.

In addition, the inculpatory statements were made several hours after the injury was suffered, defendant did not make an inculpatory statement at the first interrogation after the

injury, the videotape of the final statement showed that defendant and his mother appeared "cool, calm, and collected" throughout his videotaped statement, and defendant testified at trial that his inculpatory statement was voluntary. Under these circumstances, the trial court acted properly by denying the motion to suppress.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

Top

**§10-5(c)(1)**
**Examples: Involuntary Statements *by Adults***

**People v. Haleas**, 404 Ill.App.3d 668, 937 N.E.2d 327 (1st Dist. 2010)

1. In criminal proceedings against a police officer, the 5th and 14th Amendments prohibit use of statements which the officer made under threat of suspension or termination for exercising the right to silence. (**Garrity v. New Jersey**, 385 U.S. 493 (1967)). In **Garrity**, state law mandated discharge of police officers who invoked the privilege against self-incrimination when questioned as part of an internal police investigation. Although courts have reached differing conclusions where discharge is not mandatory, the court concluded that **Garrity**-type immunity is triggered when an officer is warned that his employment can be suspended or terminated if he exercises the right to silence when questioned about possible police misconduct. The court concluded that once such warnings are given, any statements obtained are "compelled" under the 5th Amendment.

The court rejected the State's argument that only incriminating statements are protected under **Garrity.** First, the truthfulness of a statement has no bearing on whether it is "compelled." Furthermore, even exculpatory testimony may lead to incriminating evidence.

Because defendant was warned by internal affairs investigators that termination or suspension could be based on any statement he made or on his exercise of the right to silence, his exculpatory statement could not be introduced at his subsequent criminal trial for obstructing justice, official misconduct, and perjury. The trial court's suppression order was affirmed.

2. However, the trial court erred by dismissing the indictments. Under **Kastigar v. U.S.**, 406 U.S. 441 (1972), a defendant who testifies under a grant of immunity is entitled to dismissal of the charges unless the State shows that the evidence used in the criminal proceeding has a legitimate, independent source from the compelled testimony. The court concluded that the **Kastigar** doctrine applies to statements which are "compelled" under **Garrity**. Thus, the prosecution was required to show an independent source for the evidence it used to obtain indictments against the defendant.

The court concluded that the trial court applied an erroneous standard when it required the State to show not only that the evidence on which the indictment was based was obtained from an independent source, but also that the prosecution had made no "significant non-evidentiary" use of the defendant's statements in "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination [or] otherwise generally planning trial strategy." The court stressed that the purpose of the independent source doctrine is to insure that evidence derived from immunized statements is not presented to the jury, and that extending **Kastigar** to non-evidentiary uses would place the State in a worse position than if no misconduct had occurred.

The cause was remanded for a new hearing on the motion to dismiss the charges.

**People v. Hughes**, 2013 IL App (1st) 110237 (No. 1-11-0237, 12/18/13)

Defendant was arrested and questioned concerning two murders, and gave several statements. The Appellate Court found that the confession to one of the murders was involuntary.

1. In reviewing a trial court's ruling on the voluntariness of a confession, the trial court's factual findings will be reversed only if those findings are against the manifest weight of the evidence. Ultimately, the trial court's ruling on whether the confession was voluntary is subject to *de novo* review.

The totality of circumstances determines voluntariness. The inquiry examines whether a defendant's will was overborne by the circumstances surrounding the confession. Factors considered include: (1) the defendant's age, intelligence, education, experience, and physical condition at the time of the detention and interrogation; (2) the duration of the interrogation; (3) the presence of **Miranda** warnings; (4) the presence of any physical or mental abuse; and (5) the legality and duration of the detention. A court may also consider an interrogator's fraud, deceit or trickery, and threats and promises made to a defendant. The State bears the burden of establishing voluntariness by a preponderance of the evidence.

2. Defendant was only 19 years old, had attended school through the ninth grade, and received grades of C's and D's. His juvenile arrests involved UUW and criminal trespass to a vehicle. The record did not show that he had any experience with the criminal justice system that was analogous to the circumstances here - being arrested and questioned about two murders. His youth, lack of education, and inexperience with the criminal justice system increased his susceptibility to police coercion. The court rejected the argument that defendant's ability to pronounce words of multiple syllables indicated that he was an intelligent person and had the ability to withstand police coercion.

The coercive atmosphere began when defendant was taken into custody and remained in the back seat of a car handcuffed in an uncomfortable and painful position for at least 90 minutes. He was picked up at 2:00 p.m. and the interrogation did not end until 6:00 a.m. the following day. Over the course of the interrogation, defendant's clarity and cadence of speech, alertness, and concentration deteriorated.

The coercive atmosphere was intensified when, after telling an exhausted defendant to sleep, the detective returned 25 minutes later and told defendant that he was taking him to a polygraph. The police fed defendant only a sandwich and three soft drinks during the entire 14-hour period, a meager amount of food for a large person such as defendant.

The videotape of defendant's detention also shows that defendant smoked marijuana immediately before the polygraph examination. The court concluded that marijuana use militates against a finding of voluntariness as it reduced defendant's ability to resist coercion Although defendant's use of marijuana was not noted by either party, the involuntariness of the confession was raised in the trial court and the opening brief on appeal, the Appellate Court's *de novo* review of the record included viewing the entire video, and justice sometimes requires that a court raise *sua sponte* an unargued and unbriefed reason to reverse.

Defendant was also told a number of untruths during the interrogation. While interrogators may use subterfuge in limited circumstances to elicit a confession, suppression is appropriate where the State extracts a confession using deceptive interrogation tactics calculated to overcome defendant's free will. Defendant was told several falsehoods, including that his fingerprints were found on the scene, that numerous witnesses placed him on the scene, and that one of the decedents had died of leg wounds. The falsehoods weighed more

heavily against a finding of voluntariness they occurred in proximity to defendant being told that he had failed the polygraph after having been told in the pretest interview that the polygraph was infallible and that the polygraph examiner was there to help him by informing the court that he was sorry for what he had done if he showed remorse.

Because the totality of circumstances indicate that defendant's confession to one of the murders was involuntary, the convictions for two counts of murder were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

**Top**

**§10-5(c)(2)**
**Examples: Involuntary Statements *by Minors***

**In re D.L.H., JR.**, 2015 IL 117341 (No. 117341, 5/21/15)

1. A person is in custody for **Miranda** purposes where the circumstances surrounding the interrogation would cause a reasonable person, innocent of wrongdoing, to believe that he was not at liberty to terminate the interrogation and leave. Courts look to several factors in making this determination: (1) the location, time, mood, and mode of questioning; (2) the number of officers present; (3) the presence of family and friends; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking, or fingerprinting; (5) how the defendant arrived at the interrogation site; and (6) the age, intelligence, and mental makeup of the defendant. The reasonable person standard is modified to take account of a defendant's juvenile status.

The Court found that under the facts of this case, the nine-year-old defendant, who had significant intellectual impairments, was not in custody for purposes of **Miranda**. The interrogations took place in familiar surroundings - at the kitchen table of his home. Only one officer was present. He wore his service weapon but was not in uniform. And he used a conversational tone during the questioning. Defendant's father was present. The interrogations each lasted 30-40 minutes and took place in the early evening.

Defendant's age, intelligence and mental makeup favored a finding of custody, but was only one factor, and defendant did not ask the Court to adopt a bright-line rule that all nine-year-old defendants are necessarily and always in custody. The officer was unaware of defendant's intellectual impairments and the **Miranda** custody analysis does not require officers to consider circumstances that are unknowable to them. Accordingly, defendant was not in custody and **Miranda** warnings were not required.

2. In determining whether a statement is voluntary, courts consider the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation. Defendant's characteristics include: age, intelligence, background, experience, mental capacity, education, and physical condition at the time of the questioning. Details of the interrogation include: legality and duration of the detention, duration of the questioning, provision of **Miranda** warnings, physical or mental abuse, threats or promises, and the use of trickery, deception, or subterfuge.

In the case of a juvenile, the presence of a concerned adult is a relevant factor, and "the greatest care must be taken to assure that the admission is voluntary." In light of these concerns, the Court viewed a defendant's age as a key factor in deciding whether statements were voluntary. Unlike the **Miranda** custody analysis, which considers a hypothetical reasonable juvenile, the voluntariness analysis asks whether the statements of a particular

juvenile were voluntary.

Here defendant gave two statements after two separate interrogation sessions. The Court found that the first statement was voluntary, while the second statement was not.

At the time of the suppression hearing, the trial court had already found defendant unfit to stand trial since he was unable to understand the nature and purposes of the proceedings or assist in his defense. The expert who interviewed defendant and prepared a fitness report concluded that defendant's cognitive abilities were only at the seven-to-eight year-old level. The Court found that these characteristics of defendant would "color the lens" through which it would view the circumstances of the interrogations.

3. Concerning the first interrogation and statement, the Court found that despite defendant's young age and "even younger mental age," the statement was voluntary. The questioning was non-custodial, of short duration, and was conducted in a conversational and non-accusatory manner. The officer made no threats and his questions did not suggest answers. Defendant's father was at his side and provided "sage advice" about not making any admissions.

4. The Court, however, found that the second statement was not voluntary. Before the second interrogation began, the officer asked defendant's father to move away from the kitchen table where the interrogation was taking place. Although the officer continued using a conversational tone, he gave two long monologues designed to play on defendant's fear that his father or other relatives would go to jail, and falsely assured defendant that no consequences would attach to an admission of guilt. Although an adult might have been left "cold and unimpressed" by the officers tactics, the Court found that a nine-year-old with defendant's level of intellectual functioning would have been far more vulnerable to these tactics.

The Court suppressed the second statement and remanded the cause to the Appellate Court to conduct a harmless error analysis on the erroneous admission of that statement.

**People v. Murdock**, 2012 IL 112362 (No. 112362, 11/1/12)

After he was convicted of murder, defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to file a motion to suppress statements. After conducting a third stage evidentiary hearing, the trial court denied the petition. The Appellate Court reversed the trial court's order and remanded the cause for a suppression hearing.

On remand, the post-conviction court refused to suppress defendant's statement. The Appellate Court affirmed, and the defendant appealed.

The only witnesses at the suppression hearing were the chief interrogating officer and the defendant. At the third stage evidentiary hearing some three years earlier, the defendant's grandmother testified that she went to the police station while the defendant was being interrogated, but was not allowed to speak to the minor despite her request to do so.

1. The Supreme Court did not reach the issue of ineffective assistance, but found that the post-conviction court did not err by denying the motion to suppress. Whether a confession is voluntary depends on the totality of the circumstances, including such factors as the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of the questioning, the duration and legality of the detention, and whether there were threats, promises, or physical or mental abuse by the police. No single factor is dispositive. Instead, voluntariness depends on whether the defendant made the statement freely and voluntarily without compulsion or inducement, or whether his will was overborne at the time of the statement.

The taking of a juvenile's confession is especially sensitive, requiring that the greatest

care be taken to assure that the confession was not coerced or suggested. An important consideration for juvenile confessions is whether a concerned adult was present during the interrogation. 705 ILCS 405/5-405(2) codifies the "concerned adult" factor by requiring that a law enforcement officer who makes a warrantless arrest of a minor must make a reasonable attempt to notify a parent or other legally responsible person and must take the minor to the nearest juvenile police officer. The "concerned adult" factor is particularly important where the juvenile has trouble understanding the interrogation process or asks to speak with the concerned adult, or where the concerned adult is prevented by police from speaking with the minor.

Whether the juvenile was allowed to confer with a concerned adult, and whether police interfered with such consultation, are important factors concerning voluntariness. However, a confession is not involuntary merely because a minor was denied an opportunity to confer with a concerned adult.

2. The court concluded that the issue before it was whether the post-conviction court properly denied the motion to suppress that was held after the Appellate Court's remand, and that it would only consider the evidence presented at the suppression hearing which the Appellate Court ordered. Thus, the court declined to consider the grandmother's testimony at the post-conviction hearing that her request to speak with the defendant during the interrogation was refused.

3. The court concluded that the lower court did not err by denying the motion to suppress. The court noted that the officer made no promises to the defendant, the defendant appeared to be in good condition and of normal intelligence and capacity for a 16-year-old, and there was no evidence of physical or mental abuse. Furthermore, although defendant was detained for some seven hours, he was only interrogated for about three hours and 15 minutes.

The court rejected defendant's argument that the statement was involuntary because defendant did not have an opportunity to confer with a concerned adult. Defendant argued that he should have been allowed to confer with his grandfather, who according to police officer came to the station, and that a juvenile officer should have been present during the interrogation.

The court concluded that the statement was not rendered involuntary by the failure of officers to allow defendant's grandfather to speak with defendant. It was unclear from the record why the grandfather was at the station, and the officer who spoke to the grandfather testified that neither defendant nor the grandfather asked to see the other. The court acknowledged that the officer should have informed the grandfather that he could speak with defendant if he desired, but in the absence of a request to do so "this is not a situation where a police officer affirmatively refused to let a concerned adult see a juvenile defendant."

Nor was the statement involuntary because the interrogation was conducted in the absence of a youth officer. Under Illinois law, two lines of cases have developed concerning the role of a juvenile officer. The first line holds that a juvenile officer's role is to ensure that a juvenile's parents have been notified of the arrest and that the juvenile has been given **Miranda** rights, fed, given access to restroom facilities, and not coerced. The second line of cases holds that a juvenile officer must take a more active role on behalf of the minor's interests and affirmatively protect the minor's rights. The court concluded that it need not resolve the conflict between the two lines of authority because the officer in question, although trained as a juvenile officer, was acting as the chief investigator and not as a juvenile officer. The court stressed that an officer cannot act as both an investigator and juvenile officer in the same case.

However, the court concluded that the juvenile officer's absence was mitigated because

defendant received **Miranda** warnings and was properly treated, offered food, given access to the restroom, and not subjected to physical or mental abuse. Thus, the statement was voluntary despite the absence of a juvenile officer.

4. In dissent, Justices Burke, Theis and Freeman criticized the court for misconstruing the issue as a Fifth Amendment argument rather than the claim that was raised in the post-conviction petition – whether trial counsel was ineffective for failing to file a motion to suppress. The dissenters also found that the Appellate Court erred by remanding the cause for a suppression hearing rather than ruling on the propriety of the trial court's order denying post-conviction relief. Finally, the dissenters criticized the majority for ignoring the evidence presented at the third stage post-conviction hearing, which showed the circumstances surrounding the defense counsel's failure to file a motion to suppress and that such failure constituted ineffective assistance of counsel.

The dissenters also found that defense counsel was ineffective for failing to file a motion to suppress the statements. The parties agreed that defense counsel's failure to seek to suppress the statement was objectively unreasonable, and the dissenters found that the outcome of the trial would likely have been different had the statement been suppressed because it was the only evidence that the minor had prior knowledge of his companions' intent to commit the offense.

The dissenters also found that the statement was involuntary where the grandmother was denied her request to speak to the defendant before or during the interrogation, no juvenile officer was present in the room with the defendant, defendant had no criminal history or experience with the criminal justice system, defendant was detained for several hours, and the videotape on which the court relied to find that the defendant did not appear to be under duress was made several hours after the statement in question.

The dissenters also stressed that the majority's opinion should not be taken as tacit approval for the Appellate Court's erroneous approach of ordering an unnecessary and improper remand for a suppression hearing instead of reviewing the trial court's order denying post-conviction relief on the ineffective assistance issue.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

**People v. Patterson**, 2014 IL 115102 (No. 115102, 10/17/14)

Defendant, who was 15 years old at the time he confessed, argued that his confession should have been suppressed for three reasons: (1) the police did not make a reasonable attempt to notify a concerned adult; (2) the youth officer improperly participated in the investigation; and (3) under the totality of the circumstances the confession was involuntary. The court rejected all three arguments.

1. When the police arrest a minor without a warrant, they shall immediately make a reasonable attempt to notify either (1) the parent or other person legally responsible for the minor's care, or (2) the person with whom the minor resides, and inform him or her that the minor has been arrested and where he is being held. 705 ILCS 405/5-405(2).

Defendant was a ward of the Department of Children and Family Services (DCFS) living in a residential treatment facility at the time he was arrested. The complainant was a staff member at the facility. When defendant was arrested (on a Sunday night), the officers told the director of the facility that they were taking defendant to the police station and the director gave them permission to speak to defendant.

Before defendant was interrogated, the youth officer called the director and defendant's DCFS caseworker at her office to notify them that defendant was at the police station and would soon be questioned. The officer failed to reach either person and left voicemail messages

for them. After the interrogation, the youth officer called and spoke to the director, who confirmed that the police had permission to speak with defendant.

The court held that while the youth officer could have taken additional steps to notify a concerned adult, such as calling the caseworker at her home, none of these additional steps were required. The statute only requires a reasonable attempt, not perfect performance. While DCFS was defendant's legal guardian, it was less clear who was legally responsible for his care during the year he lived in the treatment facility. And it was at least arguable that the director of the facility where defendant resided was the person with whom defendant resided and bore some responsibility for his care. Accordingly, under these facts the officer made a reasonable attempt to contact the proper person when they contacted the director and attempted to contact the caseworker.

2. The court also rejected defendant's argument that the youth officer did not properly fulfill his role where he spoke to the complainant at the police station and aided the interrogating officer by helping to type defendant's statement, reading it to defendant, and obtaining his signature.

In **People v. Murdock**, 2012 IL 112362, the court held that an officer who took the lead in interviewing the minor defendant could not act as a youth officer or concerned adult while at the same time compiling evidence against defendant. The court did not find the present situation comparable. Here, the youth officer stood by while another officer took the lead in interrogating defendant. Although the youth officer was present during the interrogation, he did not ask any questions.

Moreover, he fulfilled the fundamental duties of a youth officer, such as asking whether defendant needed anything, ensuring that he was properly treated while in custody, and reading and making sure defendant understood his **Miranda** rights. While the officer spoke to the complainant at the station, the record does not show what information he obtained or how that conversation adversely affected his performance as a youth officer. And the ministerial act of helping to type defendant's statement and reading it aloud to defendant did not clearly breach the proper role of a youth officer.

The court also noted that despite the youth officer's complete abandonment of his role in **Murdock**, the court still found that the statements were voluntary and admissible. While the presence of youth officer is a significant factor in the totality of the circumstances, there is no requirement that a youth officer be present, and the absence of a youth officer will not make the statements per se involuntary.

Here, the youth officer's actions did not remotely approach the complete abandonment of his role as in **Murdock**. If the court did not find statements involuntary in **Murdock**, then it would not find them involuntary here.

3. In determining whether a juvenile's confession was involuntary under the totality of the circumstances, courts must take great care to ensure that it did not result from mere juvenile ignorance or emotion. Relevant factors to consider include the minor's age, mental capacity, education, physical condition, the legality and length of the interrogation, physical and mental abuse by police, the presence of a concerned adult, and attempts by police to prevent or frustrate that presence.

Here, there was no evidence of any police coercion, duress, physical or mental abuse, or overt promises. Defendant based his involuntariness claim on four factors: (1) age; (2) experience; (3) police deception; and (4) time and duration of the questioning. The court addressed the first two factors together, and looking to prior cases where it had upheld confessions, found that neither defendant's age (15) nor his relatively limited experience were enough to make the confession involuntary.

The court further found that the officers' statements that they were going to check video surveillance footage from the area where the assault allegedly took place was not trickery even though the officers did not know at the time they made the statement whether such footage actually existed. The officers did no more than make a truthful assertion about what they intended to do, and as such, the court declined to find that the police engaged in any form of trickery.

Finally the court compared the time and length of the interrogation here to previous cases and held that it did not make the confession involuntary. The police took defendant into custody at 8:30 p.m. and obtained his signed confession at 11:15 p.m., after just 45 minutes of interrogation. Thus, under the totality of the circumstances, defendant's confession was not involuntary.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

**People v. Patterson**, 2012 IL App (1st) 101573 (No. 1-10-1573, modified op. 9/26/12)

1. In determining whether a confession is voluntary, courts consider such factors as: (1) the defendant's individual characteristics including age, intelligence, education, physical condition, and experience with the criminal justice system, and (2) the nature of the interrogation including the legality and duration of the detention, the duration of the questioning, and any physical or mental abuse by police. Where a juvenile's confession is involved, additional factors to be considered include the time of day when the questioning occurred and whether a parent or other adult concerned with the juvenile's welfare was present. The voluntariness of a confession is determined by the totality of the circumstances; no single factor is dispositive.

2. The State failed to show that the 15-year-old suspect's confession was voluntary. The minor, who was questioned late in the evening, had at best limited experience with the police under circumstances in which he would not have learned about the need to protect his rights.

Furthermore, the detective who purported to act as a youth officer helped gather evidence against the minor, made no effort to contact the defendant's parents, and made only a token effort to contact the residential facility at which the minor was staying. The role of a youth officer is to act as a concerned adult interested in the juvenile's welfare, and not to be adversarial or antagonistic toward the juvenile. "Youth officers cannot act in their role as a concerned adult while at the same time actively compiling evidence against [the] juvenile." (Quoting **People v. Griffin**, 327 Ill. App. 3d 538, 763 N.E.2d 880 (1st Dist. 2002)). The court stressed that by failing to contact the minor's parents and making only token efforts to contact the minor's residential facility, the officer effectively prevented any concerned adult from learning of the interrogation and coming to the minor's aid.

Because the State failed to show that the confession was voluntary, the trial court erred by denying the motion to suppress. Defendant's conviction for aggravated criminal sexual assault was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

**People v. Travis**, 2013 IL App (3d) 110170 (No. 3-11-0170, 2/28/13)

Receiving a confession from a juvenile is a sensitive concern. If counsel is not present when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

When determining whether a juvenile's confession was voluntarily given, relevant considerations include: (1) the juvenile's age, intelligence, background, experience, education,

mental capacity, and physical condition at the time of questioning; (2) the duration of the detention, including whether the police physically or mentally abused the juvenile or employed trickery or deceit in obtaining the confession; and (3) whether the juvenile had an opportunity to speak with a parent or other concerned adult prior to or during the interrogation, including whether the police prevented or frustrated such opportunities. No single factor is dispositive.

Considering the totality of circumstances, the court concluded that defendant's confession during the fifth, recorded interview by the police was involuntarily given. Defendant's basic needs were met during the interrogation. The testimony and videotapes indicate that the 15-year-old defendant was of normal intelligence and mental capacity , he was familiar with the criminal and juvenile processes, and the five interviews, conducted over an approximately six-hour period, were relatively brief.

Nevertheless, defendant was of a young and impressionable age, he was groggy after being awakened by detectives for the fifth interview, and no juvenile officer was physically present at that interview, unlike the previous three interviews. Most important, the detective erroneously led defendant to believe that he would remain in juvenile court and would get a "clean slate" when he turned 17, if he took responsibility by confessing to the shooting. In fact, defendant had to be tried as an adult as the offense was first-degree murder and defendant was 15 years old. 705 ILCS 405/5-130(1)(a).

(Defendant was represented by Assistant Defender Gabrielle Green, Ottawa.)

**Top**

**§10-6**
**Statements After Unlawful Arrest**

**§10-6(a)**
**Generally**

**People v. Johnson**, 237 Ill.2d 81, 927 N.E.2d 1179 (2010)

1. Defendants alleged that statements he made at the police station were the fruits of an illegal arrest because police handcuffed and secured him in a squad car while conducting a warrantless search of a vehicle in which he had recently been a passenger. The court held that even if defendants was subjected to an improper detention, the statements made at the police station were sufficiently attenuated from the illegal conduct to be admissible.

Factors to be considered in determining whether a statement is attenuated from the effect of an illegal arrest include the proximity in time between the illegal arrest and the statement, the presence of intervening circumstances, the flagrancy of the police misconduct, and whether **Miranda** warnings were given between the illegal conduct and the time the statements were made. The passage of time is an ambiguous factor which may or may not be significant, depending on the circumstances.

Here, there was no indication how much time passed between the detention and the statements at the station. However, defendant was formally arrested and taken to the police station based on independent probable cause - the discovery of a firearm during the search. Thus, there was clearly an intervening event which broke the causal connection between the arguably illegal detention and defendant's statement.

Furthermore, defendant received **Miranda** warnings before he gave statements at the police station, and any police misconduct was not "flagrant." Under these circumstances, the taint of any illegal conduct during the search of the vehicle was clearly attenuated.

2. The court also held that defendant had no legitimate expectation of privacy in the car, and therefore could not challenge the search of the vehicle based on the 4th Amendment. (See **SEARCH & SEIZURE**, §§ 44-1(c)(1), 44-2). (See also, **VERDICTS**, § 55-3(a)).

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

**Top**

**§10-6(b)**
**Examples: Attenuation Sufficient**

**People v. Johnson**, 237 Ill.2d 81, 927 N.E.2d 1179 (2010)

1. Defendants alleged that statements he made at the police station were the fruits of an illegal arrest because police handcuffed and secured him in a squad car while conducting a warrantless search of a vehicle in which he had recently been a passenger. The court held that even if defendants was subjected to an improper detention, the statements made at the police station were sufficiently attenuated from the illegal conduct to be admissible.

Factors to be considered in determining whether a statement is attenuated from the effect of an illegal arrest include the proximity in time between the illegal arrest and the statement, the presence of intervening circumstances, the flagrancy of the police misconduct, and whether **Miranda** warnings were given between the illegal conduct and the time the statements were made. The passage of time is an ambiguous factor which may or may not be significant, depending on the circumstances.

Here, there was no indication how much time passed between the detention and the statements at the station. However, defendant was formally arrested and taken to the police station based on independent probable cause - the discovery of a firearm during the search. Thus, there was clearly an intervening event which broke the causal connection between the arguably illegal detention and defendant's statement.

Furthermore, defendant received **Miranda** warnings before he gave statements at the police station, and any police misconduct was not "flagrant." Under these circumstances, the taint of any illegal conduct during the search of the vehicle was clearly attenuated.

2. The court also held that defendant had no legitimate expectation of privacy in the car, and therefore could not challenge the search of the vehicle based on the 4th Amendment. (See **SEARCH & SEIZURE**, §§ 44-1(c)(1), 44-2). (See also, **VERDICTS**, § 55-3(a)).

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

**Top**

**§10-6(c)**
**Examples: Attenuation Insufficient**

**Top**

**§10-7**

**Impeachment with Inadmissible Statements**

**People v. Morris**, 2013 IL App (1st) 110413 (No. 1-11-0413, 11/15/13)

Before his trial for first degree murder, defendant successfully moved for suppression of a video statement which he made following his arrest. The suppression was based on a violation of **Miranda.** There was no allegation that the statement was involuntary.

In the suppressed confession, defendant admitted throwing a metal pole or dumbbell at the decedent. In addition, an eyewitness testified that he saw defendant throw the dumbbell, and a search of defendant's car after the offense disclosed a dumbbell.

The defendant filed a motion *in limine* asking that the trial court prohibit the State from introducing evidence of the confession as impeachment. Defense counsel stated that defendant would not testify, but that the defense would call as expert witnesses medical personnel who treated defendant at the Cook County Jail. The expert witnesses would testify that they diagnosed defendant with "Hill-Sachs deformity," a shoulder condition that would have prevented defendant from throwing the dumbbell.

The trial court denied the motion *in limine*. Although defense counsel represented in an offer of proof that the experts would testify that they based their diagnosis on physical observations of defendant and examination of x-rays rather than by relying on defendant's statements, the trial court ruled that the State could use the suppressed confession to impeach the experts concerning defendant's physical ability to throw a dumbbell. After the motion *in limine* was denied, the defendant elected not to call the experts to testify.

On appeal, defendant argued that the trial court erred by ruling that defendant's suppressed confession could be used to impeach expert defense witnesses concerning their diagnoses of defendant and their opinions of his ability to throw a dumbbell.

1. The court rejected the State's argument that the issue was not properly before the court because the defendant failed to call the experts after his motion *in limine* was denied. Under **Luce v. U.S.**, 469 U.S. 38 (1984) and its progeny, a defendant who fails to testify waives any issue concerning the denial of a motion *in limine* to bar use of his prior convictions as impeachment.

The court concluded that **Luce** does not apply here. First, the trial court made a definitive ruling that the expert witnesses could be impeached with defendant's statements, and the State made clear that it would impeach the experts if they testified. Second, the ruling did not turn on factual considerations, but involved a legal issue - whether an expert witness's testimony may be impeached with a defendant's suppressed statement. Third, the record was sufficient to permit the court to consider the issue. Under these circumstances, the issue was properly before the court although defendant did not call the experts to testify.

2. On the merits, the court concluded that the trial court abused its discretion by denying the motion *in limine*. An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable, or would not be adopted by any reasonable person.

Under the exclusionary rule, evidence seized in violation of a defendant's constitutional rights is generally inadmissible at trial. However, an exception to the exclusionary rule permits the admission of illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's testimony at trial.

In **James v. Illinois**, 493 U.S. 307 (1990), the U.S. Supreme Court declined to extend this exception to permit use of a defendant's suppressed statement to impeach the testimony of witnesses other than the defendant, finding that such use would not promote the truth-seeking function of a criminal trial and would significantly undermine the deterrent effect of the exclusionary rule. The **James** court also noted that the threat of being prosecuted for

perjury is sufficient to deter false testimony by a witness who is not the accused, and that impeachment with a third party's statement is unnecessary. Furthermore, allowing impeachment of witnesses other than the accused with a suppressed statement might chill some defendants from presenting a defense through the testimony of others.

3. However, the court concluded that the error was harmless beyond a reasonable doubt because the defendant's offer of proof was weak, counsel never outlined exactly what the experts' opinions would be, and defendant was tried on an accountability theory under which he need not have thrown the dumbbell in order to be convicted. In addition, whether defendant threw the dumbbell was at best a minor part of the State's case, and three eyewitnesses identified defendant as participating in the offense. Under these circumstances, defendant would have been found guilty beyond a reasonable doubt even had the medical experts testified that he was unable to throw the dumbbell.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

Top

## §10-8
## Use of Defendant's Silence and Failure to Testify

### §10-8(a)
### Defendant's Silence

**Salinas v. Texas**, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 12-246, 6/17/13)

Defendant agreed to accompany police officers to the police station, and voluntarily answered questions about a murder without being placed in custody or receiving **Miranda** warnings. When the officer asked whether ballistics testing would show that shell casings found at the scene matched defendant's shotgun, defendant failed to answer. After a few moments of silence, the officer asked additional questions which defendant answered.

Defendant was eventually tried for murder. Over defense objection, the prosecutor argued that defendant's reaction to the officer's question during the interview was evidence of his guilt. The prosecutor argued that an "innocent person" in the same position would have denied committing the offense.

1. Defendant argued that the Fifth Amendment right against self-incrimination prohibited the prosecutor from eliciting and commenting about defendant's silence during police questioning. A plurality of three justices (Alito, Roberts, and Kennedy) rejected this argument, finding that to exercise the Fifth Amendment privilege one must expressly raise the privilege at the time of the questioning. In the plurality's view, the Fifth Amendment provides only a right against self-incrimination, not an "unqualified right to remain silent." Thus, whether a citizen has a constitutional right to refuse to answer questions "depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim." The plurality also noted that unless the Fifth Amendment privilege is expressly claimed the government is not placed on notice that it may argue either that the information which it seeks is not incriminating or that any incrimination may be cured through a grant of immunity.

The plurality acknowledged that there are two exceptions to the requirement that the privilege be expressly invoked: (1) a criminal defendant need not take the stand and assert the privilege at trial, and (2) the failure to expressly invoke the Fifth Amendment privilege is

excused where governmental coercion makes any forfeiture of the privilege involuntary. Under the second exception, a suspect who is subjected to custodial interrogation does not voluntarily forego his Fifth Amendment privilege unless he fails to claim the privilege after being given **Miranda** warnings. Similarly, forfeiture of the Fifth Amendment privilege may not be voluntary where the suspect is threatened with withdrawal of a governmental benefit such as government employment, or if assertion of the privilege would in and of itself tend to be incriminatory. In other words, "a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit or deny or refuse to answer."

Here, the interview was voluntary and defendant was free to leave at any time. Under these circumstances, defendant was required to expressly claim the Fifth Amendment privilege unless he was deprived of the ability to voluntarily do so. The court found that defendant was not limited in claiming the privilege, as it would have been a "simple matter" to state that he was not answering the questions on Fifth Amendment grounds. His failure to do so meant that the Fifth Amendment did not preclude the prosecutor's use of and comment on his silence.

The plurality declined to adopt a third exception – that the Fifth Amendment privilege need not be explicitly invoked in situations where the interrogating official has reason to suspect that the answer he seeks will be incriminating. The plurality found that such an exception would unduly "burden the Government's interests in obtaining information and prosecuting criminal activity," and would be difficult to reconcile with **Berghuis v. Thompkins**, 560 U.S. 370 (2010), which held that during an custodial interrogation which was conducted after **Miranda** warnings had been given, the defendant failed to invoke the Fifth Amendment privilege by refusing to respond to police questioning for nearly three hours.

2. In a concurring opinion, Justices Thomas and Scalia declined to decide whether the defendant invoked the Fifth Amendment privilege, and found that even if the privilege had been invoked a prosecutor does not violate the Fifth Amendment by commenting on silence during a noncustodial interview. The concurring justices believed that **Griffin v. California**, 380 U.S. 609 (1965), which held that the Fifth Amendment prohibits a prosecutor or judge from commenting on a defendant's failure to testify, "lacks foundation in the Constitution" and therefore should not be extended to prohibit comment on noncustodial silence.

3. In a dissenting opinion, Justices Breyer, Ginsburg, Sotomayor, and Kagan found that Supreme Court precedent prohibits a prosecutor from penalizing an individual for exercising his Fifth Amendment privilege. The dissenters argued that there is no ritualistic formula for exercising the Fifth Amendment, and that commenting on a citizen's silence in response to questioning is improper whether or not the Fifth Amendment privilege is specifically cited, unless the circumstances clearly suggest that the silence was not based on an exercise of the Fifth Amendment privilege.

Because defendant had been made aware that he was a suspect even though he was not placed in custody, was not represented by counsel, and was asked a question which made it clear that police were attempting to determine whether he was guilty, it was reasonable to infer that his silence was an exercise of his Fifth Amendment right. Furthermore, under these circumstances there was no particular reason that police needed to know whether the defendant was relying on the Fifth Amendment as opposed to remaining silent for some other reason. Thus, the dissenters would have held that the prosecutor erred by commenting at trial on the defendant's silence during the noncustodial interrogation.

**People v. Quinonez**, 2011 IL App (1st) 092333 (No. 1-09-2333, 9/2/11)

1. Under federal constitutional law, the State violates due process by impeaching a

defendant with his or her post-arrest, post-**Miranda** warning silence. Under federal law, the due process prohibition applies only to silence which occurs after **Miranda** warnings have been given. In other words, silence which occurs after an arrest but before **Miranda** warnings are given may be used as impeachment.

By contrast, Illinois evidentiary law prohibits impeachment of a criminal defendant with any post-arrest silence, whether or not **Miranda** warnings were given. Under Illinois evidentiary law, the fact that an accused exercised the right not to make a statement is irrelevant and immaterial to any issue at trial.

Illinois recognizes two exceptions to the general rule prohibiting impeachment with post-arrest silence. First, silence may be used as impeachment if the defendant testifies at trial that he made an exculpatory statement at the time of his arrest. Second, post-arrest silence is admissible where defendant makes a statement after his arrest and at trial gives testimony that is inconsistent with the post-arrest statement.

Moreover, in contrast to post-arrest silence, a defendant's silence before his arrest may be used as impeachment.

2. Here, the State improperly impeached defendant with his post-arrest silence. A defendant is arrested when he is restrained by police officers and placed in a squad car. The arresting officer testified that as defendant was "immediately" arrested when he dropped a bag as police approached, and defendant testified that he was handcuffed and placed in a squad car as soon as police arrived. Under these circumstances, the court rejected the State's claim that defendant's failure to flag down police or ask them for help after they stopped occurred before the arrest and were therefore admissible as impeachment.

3. The court rejected the State's argument that defendant's failure to tell police officers that a second man had placed contraband in defendant's pocket was an "act" rather than silence, and thus fell within the second exception to the Illinois rule - for making a post-arrest statement that is manifestly inconsistent with subsequent trial testimony. The court stressed that the second exception applies only where the defendant actually makes a statement which turns out to be inconsistent with his subsequent testimony. The failure to make a statement does not qualify for the second exception; post-arrest silence is necessarily ambiguous and cannot be deemed to be inconsistent with a subsequent statement.

4. A conviction need not be reversed due to improper impeachment with post-arrest silence if the error is harmless beyond a reasonable doubt. Where a defendant's testimony is significant to the defense, however, the improper use of post-arrest silence cannot be deemed harmless. Because defendant's explanation of the offense was critical to his defense in this case, the improper impeachment was not harmless.

The conviction for possession of less than 15 grams of cocaine was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

**People v. Sanchez**, 392 Ill.App.3d 1084, 912 N.E.2d 361 (3d Dist. 2009)

1. Because the defendant's post-arrest silence is neither material nor relevant to proving or disproving a charged offense, Illinois evidentiary law prohibits the impeachment of a defendant with his or her post-arrest silence, regardless whether the silence occurred before or after **Miranda** warnings were given. Furthermore, constitutional error occurs where the defendant is impeached with post-arrest silence which occurred after **Miranda** warnings were given.

However, a defendant who gives exculpatory testimony that is manifestly inconsistent with statements he made after his arrest may be cross-examined about the inconsistency.

2. As a matter of plain error, the State committed reversible error by using post-arrest silence to impeach a defendant who did not testify. Because defendant's alibi defense was presented through the testimony of other witnesses, the State was entitled to impeach those witnesses. However, it had no basis to impeach a non-testifying defendant.

Defendant's convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

Top

**§10-8(b)**
**Defendant's Failure to Testify**

Top

**§10-9**
**Use of Defendant's Prior Testimony and**
**Plea Discussion Statements**

**People v. Rivera**, 2013 IL 112467 (No. 112467, 2/22/13)

1. Supreme Court Rule 402(f) provides that "[i]f a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding."

A two-part test is applied to determine whether a particular statement is plea related. First, the court considers whether the accused exhibited a subjective expectation to negotiate a guilty plea. Second, the court considers whether this expectation was reasonable under the totality of circumstances.

Not all statements made by a defendant in the hope of obtaining concessions are plea discussions. Whether a statement is a plea discussion or an admission turns on the factual circumstances of each case. Before a discussion can be considered plea related, it must contain the rudiments of the negotiation process, *i.e.*, it must exhibit a willingness by defendant to enter a plea of guilty in return for concessions by the State. Where the defendant's subjective expectations to engage in plea negotiations are not explicit, the objective circumstances surrounding the statement take precedence in evaluating whether the statement was plea related.

2. Defendant made statements on two occasions while he was in police custody before any charges had been filed. Neither statement shows a subjective intention by defendant to negotiate a guilty plea.

First, defendant asked a detective what "guarantees would he have" if he confessed and was told he would have none. Defendant did not specify what "guarantees" he was seeking or explain what his confession would entail. He did not ask to speak with a prosecutor. He never said he was willing to plead guilty or discussed pleading guilty. Not all statements made in the hopes of obtaining some concession are plea related. Rule 402(f) was not intended to exclude mere offers to cooperate with the police.

Second, defendant told a prosecutor he wanted to know that he had guarantees that he was not going to jail if he spoke to him and the prosecutor told him he could not give him any guarantees. Again, defendant did not offer to plead guilty or even to confess. Defendant may have meant to provide a statement exonerating himself.

Even if defendant had intended to negotiate a guilty plea, his expectation would not have been reasonable where both the detective and the prosecutor told defendant they could not offer him any guarantees.

Therefore, defendant's statements were independent admissions that were admissible at trial.

**People v. Neese**, 2015 IL App (2d) 140368 (No. 2-14-0368, 4/21/15)

Under Supreme Court Rule 402(f), if a plea discussion does not result in a guilty plea then any such discussion is not admissible against the defendant. But not all statements made be a defendant hoping to obtain a concession constitute plea discussions. Any person who voluntarily speaks to the police probably hopes to benefit, and Rule 402(f) was not designed to discourage legitimate interrogation. Rule 402(f) thus does not exclude mere offers to cooperate with the police unless such offers are accompanied by the rudiments of the plea-negotiation process.

Courts employ a two-part test for deciding whether particular statements are part of plea discussions: (1) whether the defendant had a subjective expectation to negotiate a plea, and (2) whether his expectation, assuming it existed, was objectively reasonable.

Here, an officer called defendant about the theft of coins from an apartment building. Defendant stated that he wanted to speak in person to the officer and the complainant. The officer told defendant that if he came to the station and gave a full written confession, he would consider, but not guarantee, charging him with a misdemeanor. When defendant agreed to come to the station, the officer asked him what he would say. Defendant admitted that he took the coins.

The Appellate Court, employing the two-part test, held that Rule 402(f) did not apply to defendant's statements. First, there was no evidence defendant subjectively expected that he was involved in a plea discussion. He never mentioned a plea or indicated that he expected to plead guilty. Second, any belief would not have been reasonable since there was no indication that the officer had the authority to enter into a plea agreement, especially since the officer never mentioned a plea during the conversation.

The Appellate Court reversed the trial court's order suppressing defendant's statements.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

Top

**§10-10**
**Use of Codefendants' Statements**

**People v. Santiago**, 409 Ill.App.3d 927, 949 N.E.2d 290 (1st Dist. 2011)

Just as evidence of a co-defendant's confession is inadmissible as evidence of defendant's guilt, evidence that a co-defendant pleaded guilty or was convicted is inadmissible as evidence of defendant's guilt. A defendant is entitled to have his guilt or innocence determined based on the evidence against him without being prejudged according to what has

happened to another. **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978).

The court held that this rule was not violated where the prosecutor elicited from the co-defendants that they had pleaded guilty, but in the context of admitting statements that they had made at their plea hearings acknowledging the accuracy of their post-arrest statements. The post-arrest and guilty-plea statements inculpating defendant were admitted as substantive evidence pursuant to 725 ILCS 5/115-10.1 as they were inconsistent with the co-defendants' testimony at trial. The State never argued to the jury or even suggested that the co-defendants' guilt was evidence of defendant's guilt.

Justice Robert E. Gordon specially concurred. It was error, although harmless, to elicit evidence of co-defendants' guilty pleas, where it was not necessary to elicit that evidence in order to introduce the prior inconsistent statements they made at the plea hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

Top

**§10-11**
**Statements Made During Mental Examinations**

**Kansas v. Cheever**, __ U.S. __, 2013 WL 6479045 (No. 12-609, 12/11/13)

Under the Fifth Amendment, when a criminal defendant neither initiates a psychiatric evaluation nor introduces any psychiatric evidence, his compelled statements to a psychiatrist cannot be used against him. **Estelle v. Smith**, 451 U.S. 454 (1981). But if defendant introduces psychiatric evidence related to his mental-status defense, the Fifth Amendment allows the prosecution to present evidence from a court-ordered psychiatric evaluation to rebut that defense. **Buchanan v. Kentucky**, 483 U.S. 402 (1987).

Defendant offered expert testimony that his methamphetamine use rendered him incapable of forming the requisite *mens rea* to support his voluntary-intoxication defense. The prosecution rebutted the testimony of the defense expert with the testimony of its own expert, who had conducted a court-ordered evaluation of the defendant.

Because a defense expert who examined the defendant testified that defendant lacked the requisite mental state to commit the charged offense, the prosecution was entitled to offer its expert evidence in rebuttal. This rule harmonizes with the principle that when a criminal defendant chooses to testify, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence—testimony from an expert who has examined defendant. Any other rule would undermine the adversarial process.

This rule is not limited to rebut evidence of a mental disease or defect. It extends to any mental-status defense, which includes those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the offense, or ability to premeditate. It is not limited to affirmative defenses, it does not depend on whether the evaluation was jointly requested, and it is irrelevant that the mental condition is temporary rather than permanent.

**People v. Hillier**, 392 Ill.App.3d 66, 910 N.E.2d 181 (3d Dist. 2009)

Hillier was convicted of predatory criminal sexual assault. He argued that the trial court violated Illinois law and the Fifth Amendment by compelling him to submit to a sex offender evaluation which concluded that he fell in a "high category" of recidivism, a factor

that the trial court expressly used to enhance his sentence.

1. Under Illinois law, a felony sex offender who is being considered for probation must submit to a sex offender evaluation as part of the presentence investigation. 20 ILCS 4026/16; 730 ILCS 5/5-3-2(b-5). Defendant argued that because he was convicted of predatory criminal sexual assault of a child, a non-probationary Class X felony, the trial judge had no statutory authority to order him to submit to the evaluation.

The court rejected this claim, noting that no Illinois statute prohibits a trial court from ordering a sex offender evaluation in a case where probation is not an available sentence. The statute governing presentence reports "specifically allows the trial court to order supplementary information to be included in a presentence report . . . and . . . we see no reason to disallow a sex offender evaluation in non-probationary cases if the trial court deems it helpful in sentencing a defendant."

2. Defendant also contended that error occurred because he was not advised that any statements made during the evaluation could be used against him at sentencing. The court rejected this argument, finding that unlike **Estelle v. Smith**, 465 U.S. 430 (1981), which involved a pretrial competency evaluation, defendant "was ordered to participate in the evaluation after he was convicted." In addition, defendant was informed of the purpose of the evaluation, and the results were used solely for the stated purpose.

The majority opinion also cited several decisions holding that **Miranda** warnings are not required prior to presentence interviews or psychosexual evaluations.

3. Justice McDade dissented, finding that defendant's statutory and constitutional rights had been violated. Justice McDade would have held that sex offender evaluations in non-probationary cases cannot be ordered without an express grant of authority from the legislature, and that the general language found in the presentence investigation statute is "not broad enough to encompass a sex offender evaluation."

Justice McDade also believed that the Fifth Amendment is violated where a defendant is compelled to submit to a sex offender evaluation without being told that he may refuse to cooperate or that any information learned can be used to increase his sentence, and an increased sentence is subsequently based on negative information revealed in the evaluation. Under **Estelle**, "a criminal defendant may not be compelled to respond to a psychiatrist if his statements can be used against him at a sentencing proceeding."

Finally, Justice McDade believed that an **Apprendi** violation occurred. Although the trial court "sentenced the defendant within the applicable statutory range . . . there was no doubt . . . that the trial judge imposed a harsher sentence by relying on facts in the evaluation which were not established beyond a reasonable doubt."

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

**Top**